

A
T R E A T I S E
O F T H E
P L E A S O F T H E C R O W N ;

O R,
A S Y S T E M
O F T H E
P R I N C I P A L M A T T E R S R E L A T I N G T O T H A T S U B J E C T,
D I G E S T E D U N D E R P R O P E R H E A D S.

By WILLIAM HAWKINS,
SERJEANT AT LAW.

T H E S E V E N T H E D I T I O N :

In which the Text is carefully collated with the original Work ; the marginal References corrected ; new References from the modern Reporters added ; a Variety of *Manuscript Cases* inserted ; and the whole enlarged by an Incorporation of the several Statutes upon Subjects of Criminal Law, to the THIRTY-FIFTH YEAR OF GEORGE THE THIRD. To which an Explanation of the Preface is prefixed, and new and copious Indexes are subjoined.

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V O L. IV.

L O N D O N :
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1795.

AN
ANALYSIS
OF
THE FOURTH VOLUME
OF THE
PLEAS OF THE CROWN.

PROCESS on an indictment or information supposes such indictment or information to be first exhibited.

Indictments (ch. 25.) are of two kinds :

1. Such as are grounded on the common law, ch. 25. sect. 55. to 99.
2. Such as are grounded on statute, ch. 25. sect. 99 to 118.

Informations are of two kinds :

1. Such as are merely the suit of the king, ch. 26.
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The declinatory are either,

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Whereupon they must give some verdict, either general or special, c. 47.

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2. Such as give no such express sentence.

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2. The loss of the wife's dower, c. 49. f. 42 to 47.
3. The corruption of blood, c. 49. f. 47. *to the end of the chapter.*

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2. By statute, c. 49. f. 18 to 30.

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2. By writ of error.

They may be avoided by writ of error, either,

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2. For matters *dehors* the record, (c. 50. f. 2 to 10.)

The party condemned is either to be,

1. Reprieved, (c. 51. f. 8, 9.) or,
2. Executed, c. 51. f. 1 to 8.

A
T R E A T I S E
OF
THE PLEAS OF THE CROWN,

BOOK THE SECOND.

CHAPTER THE TWENTY-FIFTH.

OF INDICTMENT.

AN INDICTMENT is an accusation, at the suit of the king, by the oaths of twelve men, of the same county wherein the offence was committed, returned to inquire of all offences in general in the county, determinable by the court into which they are returned, and finding a *bill* brought before them to be true. 2. Hale, 1532

But when such accusation is found by a grand jury, without any bill brought before them, and (a) afterwards reduced to a formed indictment, it is called a PRESENTMENT. (a) Lamb. B.
4. c. 3.

And when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an INQUISITION.

For the better understanding the nature of such proceedings, I shall consider the following particulars :

1. Whether a grand jury may find part of a bill brought before them true, and part false.

2. Whether an indictment be merely the suit of the king.

3. What matters are indictable.

4. Where a man may be tried at the suit of the king for a capital offence, without any indictment.

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B

5. Whether

5. Whether a man may be arraigned on *an indictment* while an *appeal* is depending against him for the same offence.

6. Who may and ought to be indictors, and in what manner they are to be returned.

7. Within what place the offences inquired of must arise.

8. Of the form of the *body* of an indictment.

9. Of the form of the *caption* of an indictment.

10. Upon what proof it may be found.

11. In what cases it may be quashed.

12. What may be pleaded to it, and in what manner.

AS TO THE FIRST POINT, *viz.* Whether a grand jury may find part of the bill brought before them true, and part false.

Section 2. It seems to be generally agreed, that they must either find *billa vera*, or *ignoramus*, for the whole; and that if they take upon them to find it specially, or conditionally, or to be true for part only, and not for the rest, the whole is void (1), and the party (a) cannot be tried upon it, but ought to be indicted anew. And accordingly it hath been resolved, that if a grand jury indorse a bill of murder (b), *billa vera se defendendo*; or *billa vera* for manslaughter (c), and not for murder; or if they indorse a bill upon the statutes of News, *billa vera* (d), but whether *ista verba prolata fuerint imalitosè, seditiosè, vel è contra ignoramus*; or if they indorse an indictment of forcible entry, and forcible detainer, *billa vera* (e) as to the forcible entry, and *ignoramus* as to the forcible detainer; or if they indorse (f) that if the freehold were in J. S. or the possession were in J. S., then they find *billa vera*, the whole is void.

2. Keble 80.
(a) 2. Roll. 52.
3. Bulst. 206.
1. Roll. 407.
408.
(b) 2. Roll. 52.
(c) 3. Bulst. 206.
1. Roll. 408.
1. Siderfin 230.
(d) Leon. 287.
(e) Yelv. 99.
1. Siderfin 414.
Vide B. 1. c. 64. f. 40.
C. Jac. 151.
Con. 1. Sid. 99. (f) Yelv. 15.

(1) This rule relates only to cases where the grand jury take upon themselves to find part of the *same indictment* to be true, and part false, and do not either affirm or deny the fact submitted to their enquiry: but where there are two distinct counts, *viz.* one for a riot, and the other for an assault, and the grand jury find a true bill as to the assault, and indorse *ignoramus* as to the riot, this finding leaves the indictment as to the count found, just as if there had been originally that one count only. Rex v. Fieldhouse, Cowper, 325. Trin. 15. Geo. 3. B. K.

As to THE SECOND POINT, *viz.* Whether an indictment be merely the suit of the king.

Sec. 3. It is every day's practice, that it is so far esteemed the king's suit, that the party who prosecutes it is a good witness to prove it. Also it seems to be agreed (a), that no damages can be given to the party grieved upon an indictment, or any other criminal prosecution (b), notwithstanding the king, by his commission erecting a new court, expressly direct, that the party shall recover his damages by such a prosecution. Also, where, by statute, damages are given to the party grieved by the offence intended to be redressed, it (c) seems that they cannot be recovered on an indictment grounded on such statute, unless such method of recovering them be expressly given by the statute; but that they ought to be sued for in an action on the statute, in the name of the party grieved. But it seems (d) certain, that the court of king's bench, having the king's PRIVY SEAL for that purpose, may give to the prosecutor the third part of the fine assessed on a criminal prosecution, for any offence whatsoever. Also, it is every day's practice of that court, to induce defendants to make satisfaction to prosecutors for the costs of the prosecution, and also for the damages sustained by the injury whereof the defendants are convicted, by intimating an inclination on that account to mitigate the fine due to the king.

(a) 1. Rol. Abr. 220.
2. R. Abr. 834.
C. Car. 531.
558.
(b) C. Car. 558.
Vide c. 1. f. 39
4. 6, 7. 8.
(c) 1. R. Abr. 220.
1. Jones 380.
C. Car. 448.
(d) 1. Keble, 487.

As to THE THIRD POINT, *viz.* What matters are indictable.

Sec. 4. There can be no doubt, but that all capital crimes whatsoever, and also all kinds of inferior crimes of a public nature, as misprisions, and all other contempts, all disturbances of the peace, all oppressions, and all other misdemeanors whatsoever of a public evil example against the common law, may be indicted; but no injuries or private nature, unless they some way concern the king.

Vide 3. Com. Digest, 499. and 501.
(e) 27. Aff. 20.
B. Indict. 16.
a Presentment 26.
Carth. 277.

Strange, 792. 2. Burr. 1127. 3. Burr. 1698. 1706. 1727. 1731. 1. Wilf. 301.

Also it seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the (f) liberties and security of a subject, or commands a matter of public (g) convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it.

(f) 2. Inst. 55. 163.
C. Jac. 577.
10. Coke 75.
2. Croke 577.
Id. Raymond 347. 711. 992.
10. Mod. 336.
12. Mod. 30.

104. 117. 223. 446. 502. 614. (g) 1. Mod. 34. 1. Sid. 209. 230. 1. Keble 809. Fitzg. 47. 65. Strange 828. Burrow 828. 2. Scff. Ca. 19. Vide note (3) infra.

Yet if the party offending have been fined to the king in the action brought by the party, as it is said (a) that he may in every action for doing a thing prohibited by statute, it seems questionable, whether he may afterwards be indicted; because that would make him liable to a second fine for the same offence.

(b) 1. Sid. 209. Also, if a statute extend only to private (b) persons, or if it extend to all persons in general, but chiefly concern disputes of a private nature, as those relating to (c) distresses made by lords or their tenants, it is said that offences against such statute will hardly bear an indictment (1).
 1. Mod. 34. 2. Inst. 131. 1. Burr. 516. 1. Vent. 104. 2. Inst. 131, 132. 1. Levinz 299, 146. Raym. 205. 2. Keble 687, 697.

(1) It is not an indictable offence to impede the publick intercourse by delivering hand-bills in the streets, 1. Burr. 516.; nor to throw down skins into a publick way which accidentally occasions a personal injury, Strange 190.; nor for killing a hare, Strange, 679.; nor for an offence made penal by statute, without it directs to whom the penalty is payable, &c. Strange, 828.; nor for acting, unqualified, as a justice of peace, Cro. Jac. 643.; nor for entering a yard, erecting a shed, unthatching a house, or by numbers keeping another out of possession if unattended with violence or riot, &c. 3. Burr. 1698. 1706, 1727. 1731.; nor for selling short measure, &c. 1. Wilf. 301. 3. Burr. 1697.; nor for excluding commoners by inclosing, C. Eliz. 90.; nor for an attempt to defraud, if neither by false tokens or conspiracy, Strange 793, 866. 6. Mod. 105.; nor for secreting another, Ld. Raym. 1368.; nor for bringing a bastard child into a parish, Strange 644. 3. Burr. 1645. 2. Vezey 450.

Also, where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, &c. without

(d) Bond's mentioning an indictment, it seems to be (d) settled at this Case, M. 3. day, that it will not maintain an indictment, because the Geo. 1. mentioning the other methods of proceeding only, seems Show. 398, impliedly to exclude that of indictment (e). Yet it hath 399. been adjudged, that if such a statute give a recovery by action 3. Keble 34. of debt, bill, plaint, or information, or otherwise, it autho- 273. C. Jac. 643, rises a proceeding by way of indictment (f). Also, where 644. a statute adds a farther penalty to an offence prohibited by 3. Modern 79. the common law, there can be no doubt but that the offen- 4. Mod. 144. der may still be indicted, if the prosecutor think fit, at the Carthew 263. common law. And if the indictment for such offence con- Palmer 388. clude *contra formam statuti*, and cannot be made good as an 2. Sid. 434. indictment upon the statute, it seems (g) to be now settled, 439. 6. Modern 86. 2. Roll 247, 248. 398. Sess. Case 295. Ld. Ray. 682. 991. 10. Modern 337. 12. Modern 104. 446. 502. 634. Fitz. 47. 65. Str. 62. 679. 828. 1256. (c) Rex v. Dixon, Trin. 3. Geo. 1. 10. Mod. 335. (f) 3. Modern 118. 1. Siderfin 192. seem con. (g) The Norwich Case adj. Patch. 3. Geo. 1. 2. Hale 171. contra.

that it may be maintained as an indictment at common law, as will be more fully shewn in the following part of this chapter (2).

(2) Where new-created offences are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie. But where there is a prohibitory particular clause, specifying only particular remedies, there such particular remedy must be pursued, Lord Mansfield. 1. Burr. 545.; and by Mr. Justice Denison, Where an offence, not so at common law, is made an offence by act of parliament, an indictment will lie where there is a substantive prohibitory clause, though there be afterwards a particular provision and a particular remedy given; but it is otherwise where the act is not prohibitory, but only inflicts the forfeiture and specifies the remedy. Ibid. The true rule seems to be this; Where the offence was punishable before the statute prescribing a particular method of punishing it, then such particular remedy is cumulative (Burrow 728), and does not take away the former remedy; but where the statute only enacts, "that the doing an act, not punishable before, shall for the future be punishable in such and such a particular manner," there it is necessary to pursue such particular method, and not the common-law method of indictment. Ld. Mansfield, 2. Burrow 805. 834.; see also Hartley v. Hooker, Cowp. 524. Rex v. Balme, Cowp. 650. If a statute enjoin an act to be done, without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the legislature, Rex v. Davis, Sayer 133.; and this mode of proceeding in such case is not taken away by a subsequent statute, pointing out a particular mode of punishment for such disobedience, Dougl. 441. 446. Rex v. Boyal, 2. Burr. 832. Rex v. Balme, Cowp. 648.; for the court of king's bench cannot be ousted of its common-law jurisdiction without negative words or necessary implication, Cates v. Knight, 3. Term Rep. 442. Therefore where a new offence is created by statute, and a penalty annexed to it by a separate and substantive clause, the prosecutor is not confined to sue only for the penalty, but he may indict on the prior clauses, as for a *misdemeanor* in disobeying the injunction of the legislature, Rex v. Harris, 4. Term Rep. 202.; and wherever a statute forbids the doing of a thing, the doing it *wilfully*, although without any corrupt motive, is indictable, Rex v. Sainsbury, 4. Term Rep. 451.

As to THE FOURTH POINT, viz. Where a man may be tried at the suit of the king for a capital offence without any indictment.

I shall endeavour to shew,

1. Where one may be so tried as having been taken with the *mainour*.
2. Where one may be so tried upon a verdict.
3. Where upon an appeal not prosecuted.
4. Whether one may be so tried upon a sheriff's return.

As to the first particular, viz. Where one may be so tried as having been taken with the *mainour*.

SECT. 5. It is said, that anciently if one guilty of larceny (a) Ante c. had been freshly pursued and taken with the *mainour* (a), and 15. f. 41.
7. H. 4. 43. 26. Affize 32. 1. Edw. 3. 13. S. P. C. 28, 29. 148. 179. Summary 198. 1. Hale 187. 349. 2. Hale 146. 159. B. App. 130. 3. Affize 5. F. Cor. 156. 357.

the goods so found upon him had been brought into the court with him, he might be tried immediately without any indictment; and this is said to have been the proper method of proceeding in such manors which had the franchise of *infangenthefe*, but seems to be altogether obsolete at this day (3).

(3) It is said that proceedings upon the *mainour* are wholly taken away by 25. Eliz. c. 4. 28. Ed. 3. c. 2. and 42. Edw. 3. c. 3. Vide 2. Hale 149.

As to the second particular, *viz.* Where one may be so tried upon a verdict,

- (a) Sum. 199. S. 7. 6. It is (a) said, that in an action of trespass in the 2. Hale 150*, king's bench, *de muliere abducta cum bonis viri*, if the defendant be found guilty of having carried away the woman and 151*. goods with force, and feloniously, or (b) in a common action of trespass in the said court for goods carried away, if 95. F. Corone 122. it be found that the defendant feloniously stole them, he 49. shall be put to answer the felony without any further accusation; for such a charge by the oath of twelve men, on 13. Affize 5. B. Corone 77. their inquiry into the merits of a cause in a court which has (b) Sum. 199. jurisdiction over the crime, is equivalent to an indictment, 8. P. C. 94. and the king being always, in judgment of law, present in F. Indict. 31. court, may take advantage of any matter therein properly disclosed for his benefit. But such a verdict in a court which (c) S. P. C. has (c) no jurisdiction over criminal matters, seems to be 94. of little force, because such court has nothing to do with F. Indict. 31. such matters. (d) 13. Edw. 4. 3. F. Corone 39. And it seems (d), that even in the king's bench, if on any indictment whatsoever, except only an inquisition of death, found before a coroner on his view, a person not mentioned in it be found guilty of the crime whereof others (e) 13. Edw. 4. 3. are indicted, yet such finding shall not serve for an indictment against him, because it was wholly extrajudicial (e). But such finding of others guilty, whether in the king's bench, or other court of criminal jurisdiction, upon an inquisition of death, found before a coroner on view, is of greater force, because the jury acquitting the party so indicted (f), ought to inquire what other person did the (f) Supra c. 9. f. 33. fact; because it appears by a record of the highest credit, (g) B. Indict. 13. 26. Affize 62. that a person is killed (g).

Also, if a person be declared against in a proper court, for having been guilty of a misdemeanor, *simul cum A. B. et C.* and thereupon the jury find *A. B.* and *C.* guilty, it seems that such verdict will serve for an indictment against them, because it was not wholly extrajudicial.

As to the third particular, *viz.* Where one may be so tried upon an appeal not prosecuted, the following particulars seem most remarkable.

SECT. 7. FIRST, That an appeal by an innocent person, and an appeal by an approver, are equally favoured in this respect.

(a) S. P. C. 147, 148.
Sum. 199, 200.
B. Appeal 53.
B. Corone 3. 16. 49.

SECT. 8. SECONDLY, That regularly where a person is indicted and appealed of the same crime, and the appeal is not prosecuted, he shall not be arraigned upon the indictment, but upon the appeal.

(b) Sum. 199.
31. H. 6. 12.
F. Corone 18.
S. P. C. 107.
(c) 2. Hale
227. 33. Hen. 6. 1. 4. Ed. 4. 10. B. Appeal 149. S. P. C. 147. F. Corone 114.

SECT. 9. THIRDLY, That if an appellant be nonsuit in an appeal by writ, before he hath declared, the appellee cannot be arraigned at the king's suit on the writ of appeal; not only because it contains no certainty of the circumstances of the fact, which is the proper office of the declaration to ascertain; but also because, for what appears to the contrary by the record, the writ might have been purchased by a stranger; and therefore in such case it seems to be in the discretion of the Court, either to dismiss the appellee, or to bail him, till it shall appear whether there will be any other prosecution against him. But if an appellant, by writ, be nonsuit after declaration, or any appellant by bill or approver, be nonsuit, it seems, that regularly the appellee shall be arraigned at the king's suit, on the bill or declaration; because they must be as certain as an indictment, and cannot be commenced but in person.

(d) S. P. C. 118.
Sum. 199.
B. Appeal 67.
130.
F. Corone 156.
198. 357. 384.
(e) See c. 23.
f. 86, 87, &c.
(f) See c. 23.
f. 26. 131.
(g) S. P. C. 148.
B. Appeal 67.
130.
27. Affize 7.
1. Affize 5.
F. Corone 156.
198. 357.
(h) S. P. C. 148. Summary 199, 200. B. Appeal 67.

SECT. 10. FOURTHLY, It seems to be a settled rule, that where an appeal is once well commenced, and afterwards so far determined, without a full acquittal, that neither the same, nor any other plaintiff, can never bring another appeal against the same appellee, he may be arraigned upon the bill or declaration, at the suit of the king; as where an appellant, having a good title to the appeal, makes a release to the appellee, hanging the action, or suffers a nonsuit, or *retraxit*, or demurs to a good plea or issue tendered by the appellee, which demurrer is adjudged against him; or where such an appellant or approver confesses their appeal to be false, unless they make such confession in the field, upon a trial awarded by battle; for such confession amounts to a vanquishment of the appellant or approver, and consequently is a full acquittal of the appellee; after which his life shall not be brought again into danger for the same crime. And this seems to be the

(i) S. P. C. 148.
B. Appeal 118.
F. Corone 369.
B. Corone 35.
9. H. 5. 2.
(k) S. P. C. 148.
Sum. 200.
B. Appeal 27.
F. Corone 12.
(l) Sum. 199.
S. P. C. 147.
C. Eliz. 460.
F. Corone 381.
B. N. Prius 1.
F. Utlag. 47.
147, 148.
(m) S. P. C. 148. Summary 199, 200. B. Appeal 67.
(n) Dyer 120. (o) S. P. C. 148. F. Corone 103. 3. H. 6. 50. 23. Affize 10.
Sum. 200. 47. Edw. 3. 5. B. Corone 3. 16. 49. 78. B. Appeal 53. (p) 21. H. 6.
34. S. P. C. 148. Sum. 200.

only reason why after such a vanquishment, or a verdict in his favour, an appellee shall be discharged, as well against the suit of the king, as that of the party. But it seems, that in all other cases whatsoever, an appellee, in an appeal well commenced, being wholly discharged of the suit of the party, may be arraigned upon the appeal, at the suit of the king, whether such discharge were merely owing to the act of the party, as in the cases above mentioned, or to the act of the

- (a) S. P. C. 147. Court: as (a) where an approver is judged to be hanged before he hath perfected his appeal; or (b) partly to the act of law, and partly to the act of the party, as where an appeal by a woman for the death of her first husband, is abated by her marrying a second; or where an appellee is discharged of an appeal, for not (c) having been made a defendant in a former appeal, brought by the same appellant for the very same fact; or whether such discharge is merely owing to the act of God, as (d) where an appellant dies a natural death, while the appeal is depending. It seems indeed to be holden in THE YEAR BOOK (e) of 4. Hen. 6. as a general rule, that wherever a writ is abated, the declaration depending upon it is determined also, and consequently, that the appellee cannot be arraigned upon it. But to this it may be answered, that in the very same place it is allowed, that after a nonsuit in an appeal, the appellee may be arraigned at the suit of the king; and it seems difficult to give a reason why a writ is not as much determined upon a nonsuit as upon an abatement. To which may be added, that the point adjudged, which was this, that where a writ abates for a misnomer, the defendant shall not be arraigned at the suit of the king, seems plainly to go on this ground, that where a suit is ill commenced, the king shall not have a greater advantage from it than the party might have had; and therefore the opinion above mentioned, being also contradicted by the best (f) authorities, seems to be of little weight.
- (a) S. P. C. 147. (b) S. P. C. 147. (c) S. P. C. 147. (d) S. P. C. 147. (e) S. P. C. 147. (f) S. P. C. 147.

- SECT. II. FIFTHLY,* That wherever (g) an appeal abates for an insufficiency of the writ, or is barred for want of a good title in the appellant, or for any other matter which shews it was ill commenced, the defendant shall not be arraigned upon it at the suit of the king, because it never had a good foundation, and cannot give a greater advantage to the king than to the party himself who sued. And, therefore, it seems to be agreed, that if an appeal be abated for want of form apparent in the writ, as (b) for the omission of the word "*habeas*," or false (i) *Latin*, or for any other (k) apparent defect; or if it be abated for a defect not apparent of itself, but disclosed by the pleadings of the parties, as for (l) Sum. 200. a (l) misnomer, or wrongful addition, or any such like (m) B. Cor. 78. insufficiency; or if it be abated on account of the disability (n) B. App. 44. F. Cor. 12. 103. 4. H. 6. 15, 16. S. P. C. 148. Sum. 200. bility
- (g) B. App. 5. F. Corone 68. B. Corone 35. Contra 41. Affize 14. F. Age 74. (b) F. Cor. 121. S. P. C. 140. 13. Affize 10. B. Appeal 53. (i) Sum. 200. (l) B. Cor. 78. S. P. C. 148. (n) B. App. 44. F. Cor. 12. 103. 4. H. 6. 15, 16. S. P. C. 148. Sum. 200.

ability of the appellant, as by the plea of outlawry (*a*) for felony or trespass; or if it be put without day upon a plea of excommunication of the appellant; or (*b*) if it be barred by a release made before the commencement of the suit; or by reason that the time for bringing it was elapsed (*c*) before it was commenced; or because the appellant appears to have never had any right to bring it, as where in an appeal by one as wife, it is found that she was (*d*) never lawfully married to the deceased; or in an appeal by one as heir (*e*) to his father, is found that he hath an elder brother alive by the same father, &c. the appellee shall not be arraigned upon the appeal at the suit of the king, but shall be wholly discharged of it. But where an appeal is put without day on the plea of (*f*) excommunication, the appellee shall be mainprised from day to day till the plaintiff be absolved. And notwithstanding it seems to be holden generally in some (*g*) books, that where an appeal is abated for any of the insufficiencies above mentioned, or barred, the appellee shall be set at large, and be discharged, as well against the king as the party, yet (*h*) surely this must be understood only by such cases wherein it appears that neither any indictment is preferred, nor intended to be preferred by the king, nor any other appeal preferred, nor intended to be preferred by the same or some other party; for otherwise surely it cannot but be intended, that it must be in the discretion of the Court, upon consideration of the circumstances of the case, either to commit or bail the appellee for a reasonable time, in order to answer such further prosecution, or (*i*) to bind him to his good behaviour for a certain time, &c.

F. Corone 12. 68. 167. 175. 201. 384. B. Nonability 23. (*b*) Sum. 200. Vide S. P. C. 149. B. Appeal 67. 130. F. Corone 156. 198. 357. F. Error 52. 27. Affize 7. 1. Affize 5. 32. Affize 8. 7. H. 7. 5. (*i*) F. Cor. 387. S. P. C. 149.

SECT. 12. SIXTHLY, That whatsoever may be pleaded by an appellee either in bar or in abatement of an appeal, while it is carried on at the suit of the party, may (*k*) as well be pleaded by him, when it is prosecuted at the suit of the king; as (*l*) that the appellant suing an appeal of death as wife to the deceased, was never married to him, or (*m*) that she is outlawed, &c. which depends upon the reason taken notice of in the precedent sections, viz. that an appeal shall not give the king a greater advantage than the party himself who sued it.

SECT. 13. SEVENTHLY, That (*n*) wherever an appellee is arraigned upon the suit of the king, he may plead the king's pardon, in the same manner as if he had been arraigned upon an indictment; but if an appellee, who by pleading such a pardon discharges himself of an appeal at the suit of the king,

(*n*) F. Mon. de faits 128. Sum. 201. S. P. C. 1604. F. Corone 25. 11. H. 4. 41. c. 24. f. 25.

(a) S. P. C. be also indicted, it is adviseable (a) to take care at the same time when he is in such manner discharged of the appeal, to have a *cesser* of process entered on the indictment, to prevent the vexation of a causeless prosecution upon it.

As to the fourth particular, *viz.* Whether one may be tried at the suit of the king for a capital offence, without any indictment upon a sheriff's return.

(b) 2. Hale 51. *Sec. 14.* It seems to be generally agreed (b) that neither the sheriff's return of a *relicous* or an *escape*, or of any other matter, nor any other record whatsoever, except only an appeal or indictment, or something equivalent thereto, as the verdict of twelve men, finding a man guilty in such manner as is above set forth in the sixth section of this chapter, can, at this day, put a man upon his trial for a capital offence, as being contrary not only to the common law, but to (c) *MAGNA CHARTA*, and other (d) statutes made in affirmance of it.

25. Ed. 3. de *proditionibus*, c. 4. 28. Edw. 3. 37. Edw. 3. 18.

As to THE FIFTH POINT, *viz.* Whether a man may be arraigned on an indictment, while an appeal is depending against him for the same offence.

(e) See Pream. *Sec. 15.* It seems (e), that it was the common practice before the statute of 3. Hen. 7. c. 1. whether any appeal were depending or not, not to try any man, upon an indictment of murder, before the year and day were passed, lest thereby the suit of the party should be prevented. And if such regard were had to an appeal where none was depending, it cannot be thought but that much (f) greater was had to one actually depending whether before or after the year and day were passed (g). Yet it seems, that the Court was never in any case peremptorily bound to suspend the proceedings on an indictment in respect of an appeal, but might always in discretion, whenever it should seem proper, proceed on an indictment, hanging an appeal. And accordingly we find, that in many instances (h) in the old Books, where it is holden, that in an appeal by an infant, the parol (i) should demur till his full age, the Court have proceeded to try a man upon an indictment, while an appeal by an infant was depending against him, to prevent the delay, which could not but be occasioned, if the proceedings should be deferred till the appellant should come to full age. Also (k), where a writ of appeal of robbery hath been sued out against a person under an indictment for the same robbery, and

(f) 44. Ed. 3. 38.
31. H. 6. 11.
31. Ed. 3. 23.
F. Cor. 18. 124.
F. Respon. 36.
(g) 4. Coke 45.
7. H. 4. 34. 35.
31. H. 6. 28. 29.
F. Conspir. 6.
F. Corone 82.
Qu. F. Cor. 314.
B. Appeal 41.
(h) F. Corone 278, 279.
32. Affize 8.
41. Affize 14.
B. Appeal 75.
Qu. F. Cor. 114.
21. Ed. 3. 23. B. Appeal 105. 119. (i) 13. Aff. 10. F. Age 41. 47. 17. Ed. 4. 2. B. Ap. 105. Sup. c. 23. f. 30. (k) 31. H. 6. 11. F. Corone 18.

ready to be tried, the Court have refused to put off the trial of the indictment in respect of such writ of appeal; because before the appellant hath declared, it doth not judicially appear that both the indictment and appeal are for the very same fact. But if there was no such special reason to induce the Court to proceed upon an indictment while an appeal is depending, it seems to have been the general (a) practice to suspend the proceedings on the indictment till the appeal were determined. (a) Dyer 296.

As to THE SIXTH POINT, viz. Who may be, and ought to be INDICTORS, and in what manner they are to be returned.

I shall endeavour to shew,

1. How these matters stand by the common law;
2. How by statute.

As to the first particular, viz. Who ought to be grand jurors, and how returned by common law.

SECT. 16. It seems clear, that by the common law every indictment must be found by twelve (b) men at the least, every (c) one of whom ought to be of the same (d) county, and returned by the sheriff, or other proper officer, without the nomination of any other person whatsoever; and ought also to be a freeman, and a lawful liege subject; and consequently neither under an (e) attainder of any treason or felony, nor a (f) villein, nor alien, nor outlawed, whether for a criminal matter, or, as (g) some say, in a personal action. (b) C. Eliz. 654. (c) Vide 2. Bur. 1088. (d) 3. Inst. 30. (e) 2. Inst. 387. (f) Co. Lit. 156. (g) See Pream. 11. H. 4. 9. 3. Inst. 32, 33, 34. 12. Coke 99. (d) 2. Roll. 82. (c) 3. Inst. 32. (f) Popham 202. (g) 2. Hale 155. 3. Inst. 32. 21. H. 6. 30. Vide F. Pro. 208. Qu. C. Car. 134. 147. 1. Jones 198, 199.

And from hence it seems clear, that if it appear by the caption of an indictment, or otherwise, that it was found by (b) less than twelve, the proceedings upon it will be erroneous (i). (b) C. Eliz. 654. (i) 11. H. 4. 41. B. Cor. 189.

B. Indict. 2. 21. H. 6. 30. Qu. C. Car. 134, 135. 147.

Also it seems, that any one who is under a prosecution for any crime whatsoever, may, by the common law, before he is indicted, challenge any of the persons returned on THE GRAND JURY; as being outlawed for felony, &c. or villeins, or returned at the instance of a prosecutor, or not returned by the proper officer, &c.

(a) 1. Keble 629. *Sect. 17.* Also many indictments in inferior (a) courts have been (b) quashed for want of the words "*proborum et legalium hominum*," in the caption of the indictment, setting forth by what person it was found (c). But this is said (b) C. Eliz. to be no exception to an indictment found in the court of king's bench, or grand sessions, or counties palatine, and hath been often (d) over-ruled, as to indictments in other courts; because all men shall be intended to be honest and lawful, until the contrary appear.

2. Roll. 400. 2. R. Abr. 82. 3. Modern 122. Popham 202. (c) 1. Keble 629. 2. Keble 471. 1. Levinz 208. (d) 2. Keb. 135. 208. 1. Keb. 50. C. J. c. 41. 1. Sid. 106. 367. Qu. 2. R. Ab. 82.

(c) 11. H. 4. 41. *Sect. 18.* It is resolved in the (c) YEAR BOOK of 11. Hen. 4. F. Indict. 25. by the advice of all the justices, that one outlawed on an Corone 89. indictment of felony, may plead in avoidance of it, that one B. Indict. 2. of the indictors was outlawed for felony, &c. But it seems Infra f. 27. (f) S. P. C. 82. opinion, that this resolution is rather 12. Coke 99. grounded on the statute of 11. Hen. 4. c. 9. which was made Sum. 202. in the same Term in which this resolution was given, than 3. Inst. 32, on the common law; because it appears by the very same 33, 34. YEAR BOOK, that when this plea was first proposed it was Vide C. Car. disallowed; from whence, as I suppose, it is collected, that 134, 135. the subsequent resolution was founded on the authority of the said statute, which may be intended to have been made after the plea was disallowed, and before the subsequent resolution by which it was adjudged good. Yet, considering that the said resolution was given in the beginning of Hilary Term, and that the parliament which made the said statute was not holden before the beginning of the same Term, and therefore it is not likely that the said statute was so soon made; and also considering, that the said resolution was given by advice of all the Judges, who seem to have been consulted about the validity of the plea above mentioned at the common law, and takes no manner of notice of any statute, but only of the law in general, it may deserve a question, Whether such plea be not good at the common law?

Vide 2. R. Ab. 647, 648. *Sect. 19.* I do not find it any where holden, that none 647, 648. but freeholders ought to be returned on a GRAND JURY (4). C. Eliz. 413. But how far the law is in this respect altered by statute, shall C. Jac. 672. be shewn in the twenty-first section.

(4) They ought to be freeholders, but to what value it is uncertain. 2. Hale 155. which seems to be *casus omisus*, and proper to be supplied by the legislature. 4. Com. 302.

As to the second particular, *viz.* How the matters above-mentioned stand by statute.

Sect. 20. It is enacted by the *statute of Westminster the second*, c. 28. "That old men above the age of seventy years, persons
"perpetually

perpetually sick, or infirm at the time of the summons, "or not dwelling in the county, shall not be put in juries, "or lesser assizes." And the equity thereof, and the reason of the thing, seem plainly so far to extend to grand juries, that if it shall appear, that any of the persons abovementioned be returned on a grand jury, the Court, into which they are returned, will easily excuse their non-appearance. But it seems clear (a), that any such persons being returned on a grand jury, may lawfully serve upon it, if they think fit. Neither do I find that they can have an action on the said statute for being so returned; for the writ (b) in the *Register* grounded on and reciting the statute, mentions the prohibition of it to be, that men above the age of seventy years shall not be put in *assisis, iuratis, vel recognitionibus aliquibus*, which expressions seem proper for petit juries only; whereas the (c) writ grounded on the statute of *Articuli super Chartas*, set forth at large in the twenty-first section, recites the prohibition thereof to be, that none of the persons in the writ mentioned shall be put in *inquisitionibus nec iuratis*, which expression seems to be of a large extent, and to take in grand as well as petit juries; by which it seems clearly to be implied, that in the judgment of those who formed the said writ, the statute last mentioned is more general than the former.

Sec. 21. It is farther enacted by the abovementioned statute of *Westminster the second*, c. 38. "That none shall be put "in assizes or juries, though they ought to be taken in the "proper county, who have less tenements than to the value "of twenty shillings yearly." And it is required by the statute of 21. Edw. 1. commonly called the statute *De his qui ponendi sunt in assisis*, "that they should have tenements to "the value of forty shillings yearly;" Provided, "that "before justices in eyre for common pleas in their eyres, "and also in assizes, and juries, which shall be taken in "cities and burghs, and other trading towns, the same may "be done as was accustomed:" And this exception is likewise mentioned in the (d) writ in the *Register*, which seems to be grounded on both these statutes; by which it appears, that neither by the common law nor by these statutes there was any necessity in proceedings before justices in eyre, &c. that petit jurors should be freeholders; and if so, it seems probable that there is no greater necessity that grand jurors making an inquiry before them should be freeholders; and if a grand juror before such justices need not to be a freeholder, why should there be a greater necessity that a grand juror before other justices should be a freeholder? And it is farther remarkable, that the abovementioned

(a) 2. Inst. 448.

(b) Reg. 180.

F. N. B. 166.

Vide 2. Inst.

447, 448.

(c) Regist. 178.

F. N. B. 165.

(d) Regist. 181.

F. N. B. 166.

Vide 2. R.

Abr. 647, 648.

C. Eliz. 413.

tioned writ in *the Register*, which seems to be grounded on these statutes, mentions only persons put in *affisis, juratis, vel recognitionibus aliquibus*: To which may be added, that the (a) several subsequent statutes, which require that none but freeholders or copyholders of lands of such a value shall be returned on juries, expressly extend only to juries returned for the trial of issues, except only the (b) statutes concerning indictments in the sheriff's torn, which require, that every juror finding such indictment shall have twenty shillings yearly of freehold, or twenty-six shillings of copyhold, and also except 3. Hen. 7. c. 1. which requires, that every juror of an inquest, by which justices of peace shall inquire of concealments by other inquests, shall have tenements of the yearly value of forty shillings, and also except 33. Hen. 6. c. 2. which requires, that every indictment in the county palatine of *Lancaster*, of persons supposed by the same indictment to live in some other county, and also every indictment in any other county, of persons in the same indictment, supposed to live in the said county of *Lancaster*, shall be taken by such jurors only as have lands to the yearly value of one hundred shillings: all which seems to make it doubtful, whether there be any necessity either by the common law or statute, that a grand jury in any other case must be a freeholder (5).

(5) Vide supra note to section nineteen.

Sett. 22. It is enacted by 28. Edw. 1. commonly called the statute of *articuli super chartas*, cap. 9. "That no sheriff, nor bailiff, shall impanel in inquests, nor in juries over many persons, nor others, nor otherwise than as is ordained by statute: And that they shall put in those inquests and juries, such as be next neighbours, most sufficient and least suspicious."

And the like is enacted almost in the very same words by 42. Edw. 3. c. 11. And it is farther enacted by the said statute of *articuli super chartas*, "That he who doth contrary, and is attainted thereupon, shall pay unto the plaintiff his damages double, and shall be grievously amerced to the king."

a. Inst. 562.

And the said statute of *articuli super chartas*, is said by Sir *Edward Coke* to extend to all suits or proceedings, either criminal or civil, real, personal, or mixed, publick or private, affizes or inquests; and surely that part of it which ordains, "that the most sufficient and least suspicious shall be returned on all juries," is so agreeable to common right and natural justice, that it cannot but be thought to be in affirmation of the common law, and equally to extend to grand and

and petit juries, and consequently if any officer shall be wilfully guilty of an offence against it in the return of any jury, he cannot but be punishable for his contempt, at the suit of the king.

And it is enacted by 23. Edw. 3. c. 6. "That justices of assize shall have commissions sufficient to inquire in their sessions of sheriffs, &c. for putting into panels jurors suspect and of evil fame."

And it is farther enacted by 34. Edw. 3. c. 4. "That all panels shall be made of the next people, which shall not be suspect nor procured. And that the ministers which do against the same, shall be punished before the justices, who take the inquest, according to the quantity of their trespass, as well against the king as against the party for the quantity of the damage which he hath suffered in such manner;" and both these statutes seem equally to extend to the undue return of grand and petit juries.

But it is observable, that the clause of the above-recited statute of *articuli super chartas*, which ordains, "That the sheriff, &c. shall render double damages," extends only to juries returned in suits between party and party, because it says, that he shall render them to the plaintiff, which is a denomination never given to the king or prosecutor, where the proceeding is by way of indictment; and accordingly we find that the writs in *the (a) Register* grounded on this statute expressly relate to suits between party and party.

(a) *Regist.* 178.
F. N. B. 165.

Stat. 23. But the principal statutes relating to the return of grand juries are 11. Hen. 4. c. 9. and 3. Hen. 8. c. 12. the first whereof is as followeth, "Because that now of late inquests were taken at *Westminster*, of persons named to the justices, without due return of the sheriff, of which persons some were outlawed before the said justices of record, and some fled to sanctuary for treason, and some for felony, there to have refuge, by whom, as well many offenders were indicted, as other lawful liege people of our lord the king, not guilty, by conspiracy, abetment, and false imagination of other persons, for their special advantage and singular lucre, against the course of the common law used and accustomed before this time." Our said lord the king, for the greater ease and quietness of his people, willeth and granteth, "That the same indictment so made, with all the dependance thereof, be revoked, annulled, void, and holden for none for ever: And that from henceforth no indictment be made by any such persons, but by inquest of the king's lawful liege people, in
" the

"the manner as was used in the time of his noble progenitors, returned by the sheriffs, or bailiffs of franchises, without any denomination to the sheriffs, or bailiffs of franchises before made by any person, of the names, which by him should be impanelled, except it be by the officers of the said sheriffs or bailiffs of franchises sworn and known to make the same, and other officers to whom it pertaineth to make the same according to the law of ~~England~~: and if any indictment be made hereafter in any point to the contrary, that the same indictment be also void, revoked, and for ever holden for none."

In the construction of this statute the following points have been resolved.

Sec. 24. (a) FIRST, That where a person not returned by the sheriff on a grand jury procures his name to be read among those of others who were actually returned, whereupon he is sworn of the grand jury, &c. he may be indicted, either in the king's bench (b) or before justices of *oyer and terminer*, for his contempt of the statute; and being found guilty, may be fined and imprisoned; and yet the statute doth not expressly provide that any such person shall be any way punished, but only that the indictment shall be void, &c.

Sec. 25. (c) SECONDLY, That indictments of offences not capital, are as much within the statute as indictments of treason or felony; and also indictments before justices of peace as much as indictments before superior justices; but it hath been (d) questioned, whether a coroner's inquest be within the purview of it.

Sec. 26. THIRDLY, That a person arraigned upon any indictment taken contrary to the purview of the statute (e), may plead such matter in avoidance of the indictment, and also plead over to the felony.

Sec. 27. FOURTHLY, That a person outlawed upon any such indictment without a trial, may also shew in avoidance of the outlawry, that the indictment was taken contrary to the purview of the statute, as seems fully to appear from the (f) above-mentioned Year Book of 11. *Hen. 4. pl. 41.* But if a person, who is tried upon such an indictment, take no such exception before his trial, it may be (g) doubtful whether he may be allowed to take such exception afterwards, because he hath slipped the most proper time for it; except it can be verified by the records of the same court wherein the indictment is depending, as by an outlawry in such court of one of the indictors, &c. in which case it is (h) said, that any one, as *amicus curiæ*, may inform the Court of it.

Sec. 28.

Sect. 28. (a) **FIRSTLY**, That if any one of the grand jury, who find an indictment, be within any one of the exceptions in the statute, he vitiates the whole, though never so many unexceptionable persons joined with him in finding it. (a) 11. H. 4. 41. pl. 8. Sum. 202. S. P. C. 88. 3. Inst. 33.

Sect. 29. **SIXTHLY**, That if a prisoner, indicted offelony, offer to take any such exception, he shall, upon his prayer, have (b) Counsel assigned him for his assistance in it. (b) Cro. Car. 134. 147. 1. Jones 198. 3. Inst. 34.

Sect. 30. (c) **SEVENTHLY**, That the Court needs not admit of the plea of the outlawry of an indictor, in avoidance of any such indictment, unless he who pleads it have the record ready. (c) C. Car. 147.

Sect. 31. It seems somewhat questionable (d), whether outlawry in a personal action be within the purview of the statute. (d) Jones 108. C. Car. 134. 147. Vide sup. f. 16. 2. Hale 155*.

Sect. 32. It is recited by the abovementioned statute of 3. Hen. 8. c. 12. " That many oppressions had been, by the untrue demeanor of sheriffs and their ministers, done to great numbers of the king's subjects, by means of returning, at sessions holden for the bodies of shires, the names of such persons, as for the singular advantage of the said sheriffs and their ministers would be wilfully forsworn and perjured, by the sinister labour of the said sheriffs and their ministers; by reason whereof many substantial persons (the king's true subjects) had been wrongfully indicted of divers felonies and other misbehaviour by their covin and falsehood; and also sometimes by labour of the said sheriffs, divers great felonies had been concealed, and not presented by the said persons, by the said sheriffs and their ministers partially returned, to the intent to compel the offenders to make fines, and give rewards to the said sheriffs and their ministers." For other particulars relating to juries, vide 4. & 5. W. & M. c. 24. 7. & 8. W. 3. c. 32. 3. & 4. Ann. c. 18. 3. Geo. 2. c. 25. 4. Geo. 2. c. 7. f. 3.

And thereupon it is enacted, " That all panels to be returned, which be not at the suit of any party, that shall be made and put in by every sheriff and their ministers afore any justice of gaol delivery, or justices of peace, whereof one to be of the *quorum*, in their open sessions, to enquire for the king, shall be reformed by putting to, and taking out of the names of the persons which so be impanelled by every sheriff and their ministers, by the discretion of the same justices, before whom such panels shall be returned. And that the same justice and justices shall command every sheriff, and their ministers in his absence, to put other persons in the same panel by their discretions: N. B. If the inhabitants of a hundred have enjoyed an immemorial exemption from serving upon juries, they are not liable to be summoned under any of the different statutes relative to juries. " and Douglas 218.

“ and that the same panels so reformed by the said justices
 “ be good and lawful. And that if any sheriff, or any their
 “ minister, at any time do not return the same panels so
 “ reformed, that then every such sheriff and minister so
 “ offending shall forfeit for every such offence twenty shil-
 “ lings, &c.”

2. Hale 156.
 3. Inst. 31.
 Con. S. P. C.
 88.
 4. St. Tr. 183.
 Sect. 33. It hath been resolved, that this statute doth not take away the force of the above recited statute of 11. Hen. 4. in any point wherein it doth not expressly vary from it; from whence it follows, that if any of the jurors who find an indictment be outlawed, or returned by a sheriff or bailiff, at the nomination of any other person, the indictment may be avoided in the same manner as before, by force of 11. Hen. 4. except such nomination be made by the justices authorized by 3. Hen. 8. to reform that panel.

As to THE SEVENTH POINT, viz. Within what place the offences inquired of must arise.

Sect. 34. Notwithstanding it was anciently (a) holden, that if one who had committed a robbery in the county of A. were taken with the *mainour* in the county of B. he might be put to answer in the county of B. (by which I suppose it is intended that he might be put to answer on an indictment found in the county of B.) and then tried by a jury from the county of A. yet it seems to be generally (b) agreed at this day, that by the common law, no grand jurors can indict any offence whatsoever, which doth not arise within the limits of the precincts for which they are returned. And upon this ground it hath been resolved to be a fatal exception to an indictment, that it doth not appear by it that the offence arose within the (c) county, or (d) riding, or (e) other special division, or (f) precinct, for which the jury which found it was returned; and *a fortiori* therefore it must be a (g) good exception, that it expressly appears by the indictment that the offence arose in a county, &c. different from that for which the jury was returned. And it is (h) holden, that even the finding of a collateral matter, expressly alledged in the indictment to have happened in a different county, is void. But (i) some have holden, that if the county be expressed in the margin of an indictment, the vill or vills in which the offence is laid, shall be intended to be in the same county. But the greater (k) number of authorities require a greater certainty, as by expressly alledging such vill or vills to be in the county named in the margin, or *in comitatu prædicto*, which seems to be sufficient
 (a) 26. Aff.
 32.
 5. Cor. 194.
 6. Sup. l. 5.
 (b) 3. Inst. 49.
 Sum. 203.
 4. Comm. 303.
 (c) 1. Bulst.
 203. 205.
 C. Eliz. 137.
 Dyer 69.
 1. Keble 302.
 (d) C. Jac.
 276.
 (e) C. Jac. 176.
 (f) Keilw. 89.
 33.
 (g) C. Eliz.
 137.
 (h) C. Jac. 17.
 (i) 1. Bulst.
 203.
 1. Sid. 312.
 Keilwood 33.
 C. Jac. 167.
 (k) 1. Sid. 345.
 C. Eliz. 646. 677. 718. 731. C. Jac. 96. 276. 2. Keble 302. 2. P. Will. 439.
 where

where but one county is named before; but to be (a) uncertain, where a county is named in the body of the indictment different from that in the margin. But it seems from the authority of (b) *Baud's Case*, that if a fact be alleged in *B. junr D. in comitatu E.* being the same county for which the jury is retufilled, the county is set forth with sufficient certainty, because *B.* shall be intended to be in the same county with *D.* Also if one be indicted for a rescous from an arrest in the county of *B.* it hath been (c) holden, that it is needless to express the county wherein the rescous was done with greater certainty, because it shall be intended to have been in the same county wherein the arrest was (d); *a fortiori* therefore; if a fact be alleged at *B.* in the parish of *C.* in the county of *D.* it cannot but be intended that *B.* as well as *C.* is in the county of *D.*

5. H. 7. 17. 10. Edw. 4. 15. Dyer 69. (d) C. Eliz. 108. Andrews 162.

(a) C. Eliz. 100. 184. 436. confirmed in the case of Rex v. Fosset, Easter Term, 12. Will. 3. 1. Peer Wms. 497. (b) C. Jac 41. (c) C. Jac. 345. F. Cor. 45. F. Attach. 1. F. Ret. de Vife. 32. B. Ret. de Brief 97. 3. H. 7. 21.

Sec. 35. But of whatsoever nature an offence indicted may be; whether local or transitory, as seditious words, or battery, &c. it seems to be (e) agreed, that if upon *not guilty* pleaded it shall appear, that it was committed in a county different from that in which the indictment was found; the defendant shall be acquitted, as shall be shewn more at large in the chapter concerning Evidence.

(e) Sum. 203. Kelynge 15. 2. Hale 163.

Sec. 36. And therefore at the common law, if a man had died in one county of a stroke received in another, it seems to have been the more (f) general opinion, that regularly the homicide was indictable in neither of them, because the offence was not complete in either, and no grand jury could inquire of what happened out of their own county.

(f) Vide B. 1. c. 31. f. 13. 6. H. 7. 10. 10. H. 7. 28. F. Indict. 23. 10. H. 7. 20.

See Prea. 3. Edw. 6. 24. Con. F. Cor. 373. Indict. 24. 7. H. 7. 8. F. Corone 446. 2. Hale 164.

But this inconvenience is remedied by 2. and 3. Edw. 6. c. 24. by which it is enacted, "That where any person shall be feloniously stricken; or poisoned in one county, and die of the same stroke or poisoning in another county, that then an indictment thereof found by jurors of the county where the death shall happen, whether it shall be found before the coroner, upon the sight of such dead body; or before the justices of peace, or other justices or commissioners, which shall have authority to inquire of such offences, shall be as good and effectual in the law, as if the stroke or poisoning had been committed and done in the same county where the party shall die; or where such indictment shall be so found."

(a) F. Bā. *Sect.* 37. And it seems by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in (a) either county.

(b) Keil. 160. *Sect.* 38. Also by the common law, if one guilty of larceny in one county carry the goods stolen into another, he may be indicted in (b) either, as hath been more fully shewn
 4. H. 7. 5.
 F. Cor. 62.
 (c) Ch. 33. in the first (c) Book.

Sect. 39. Also if a man marry two wives, the first in a foreign country, and the second in England, it is (d) holden, that he may be indicted and tried for it in England upon the statute of 1. Jac. 1. c. 11. which makes it felony; because the second marriage alone was criminal, and the first had nothing unlawful in it, and was merely of a transitory nature: but where the second marriage is in a foreign country, it hath been holden, that the party is not triable on the statute abovementioned; but this seems contrary to the purview of it, as hath been more fully shewn in Book 1. chap. 43. *sect.* 7.

Sect. 40. Also if a woman be taken with force in one county, and carried into another, and there married, the offender may be indicted and tried in the second county, upon the statute of 3. Hen. 7. c. 2. against forcible marriage, because the continuance of the force in such county amounts to a forcible taking within the statute. But if an offence in stealing, taking away, withdrawing, or avoiding a record, against the purport of 8. Hen. 6. c. 12. be committed partly in one county and partly in another, so as not to amount to a complete offence within the statute in either, it is said that the party cannot be indicted for a felony in either, but only for a misprison.

Sect. 41. It is enacted by 26. Hen. 8. c. 6. "For the punishment and speedy trials, as well of the counterfeiters of any coin current within this realm, washing, clipping, or minishing of the same, as of all and singular felonies, murders, wilful burning of houses, manslaughters, robberies, burglaries, rapes, and accessaries of the same, and other offences feloniously done within any lordship marcher of Wales," "That the justices of the gaol delivery, and of the peace, and every of them for the time being in the shire or shires of England, where the king's writ runneth (6), next adjoining to the lordship marcher, or other places in Wales, where such counterfeiting, washing, clipping, or minishing of any coin current within this realm, or murder, shall be committed; or where any other felonies or accessaries shall be committed; shall have full power

(6) Vide Rex v. Amery, Trin. 26. Geo. 3. Trin. Rep. 363.

" power at their sessions and gaol delivery to inquire by
 " verdict of twelve men of the same shire or shires next ad-
 " joining, within *England*, where the king's writ runneth,
 " there to cause all such counterfeiters, washers, clippers
 " of money, felons, murderers, and accessaries to the same, See the case of Parry v. Roberts, Cases in Cro. Law.
 " to be indicted according to the laws of this land, in like
 " manner and form as if the same petit treasons, murders,
 " felonies, and accessaries to the same, had been done within
 " any of the said shires within the said realm: And also to
 " hear, determine and judge the same, according to the
 " laws of the realm."

Sec. 42. And it seems generally to have been (*a*) holden, (*a*) 1. Mod. 64. 68.
 that the power given by this statute to the justices of gaol-
 delivery, and of the peace, in the adjoining *English* counties, 2. Keble 685.
 in relation to the offences therein mentioned, is not repealed Car. 247. 337.
 by 34. and 35. Hen. 8. c. 26. which impowers the justices 1. Hale 157.
 of the grand sessions in *Wales* to take indictments of such See B. 1. c. 31.
 offences. sect. 14.

But it hath been (*b*) resolved, that an acquittal on an in- (*b*) 1. Lev. 118.
 dictment at THE GRAND SESSIONS is a good bar of an in-
 dictment for the same crime in an *English* county.

Sec. 43. By 28. Hen. 8. c. 15. " treasons, felonies, and See this act
 " robberies, &c. upon the sea, &c. shall be inquired, &c. more fully set
 " in such places in the realm as shall be limited in the king's forth and ex-
 " commission, in like manner as if such offences had been pounded, Bk.
 " committed on the land." 1. c. 37.

Sec. 44. It hath been resolved, that this statute extends Qu. Moor 121.
 not to offences done in creeks or ports within the body of a
 county, because such offences were always cognizable by
 the common law.

Sec. 45. Also it hath been (*c*) resolved, that the force (*c*) 3. Inst. 11.
 of this statute, in relation to treasons done upon the sea, is 112.
 not taken away by 35. Hen. 8. c. 2. more fully set forth in 4. Inst. 124.
 the forty-ninth section.

† It has also been resolved, that this statute is not con-
 fined to the lordship marchers, but that the judges of assize, Athoe's Case,
 in the next adjacent *English* county, have a concurrent ju- Stra. 553.
 risdiction throughout all *Wales* with the justices of the grand
 sessions, and that a murder committed in *Pembrokeshire*, which
 is an ancient *Welsh* county, but no part of the lordship mar-
 chers, may be tried in the county of *Hereford*.

(a) Yelv. 134. *Sett.* 46. It was made a (a) doubt upon this statute, whether one who was an accessory at land to a felony at sea, were triable by the admiral, within the purview of it; but this is settled by 11. & 12. Will. 3. c. 7. made perpetual by 8. Geo. 1. c. 19. which enacts, "that accessaries to piracy before or after," in such manner as is set forth more at large in that statute, "shall be inquired of, tried, and adjudged according to the said statute of 28. Hen. 8. c. 15."

Vide also 4. Geo. 1. c. 11. + And it is enacted by 8. Geo. 1. c. 24. made perpetual by 2. Geo. 2. c. 28. "That all persons who are made accessaries by 11. & 12. Will. 3. c. 7. shall be deemed and taken to be principal pirates, felons, and robbers, and shall be proceeded against accordingly."

4. Geo. 1. c. 11. *Sett.* 47. It is farther enacted by the said statute of 11. & 12. Will. 3. c. 7. "That all piracies and felonies upon the sea, &c. may be tried at sea, or upon the land, in his majesty's plantations," in such manner as hath been more fully set forth in the first Book.

(b) 19. E. 4. 6. *Sett.* 48. It seems to have been a great (b) doubt before the making of the statute of 35. Hen. 8. c. 2. in what manner and in what place HIGH TREASON done out of the realm was to be tried. For some seem to have holden, that it was triable only upon an (c) appeal before the constable and marshal; others, that it might be tried upon an indictment, laying the offence in (d) any county where the king pleased; and others, that it was triable by way of indictment in that county (e) only wherein the offender had lands; but surely it (f) cannot reasonably be doubted, but that it was triable some way or other; for it cannot be imagined that an offence of such dangerous consequence, and expressly within the purview of 25. Edw. 3. should be wholly unpunishable, as it must have been, if it were no way triable.

(c) Vide sup. c. 4. sect. 9. & c. 23. f. 29. *Sett.* 49. But for a plain remedy, order, and declaration of this matter, it is enacted by 35. Hen. 8. c. 2. "That all manner of offences, being then already made or declared, or after to be made or declared, by any of the laws and statute of this realm, to be treasons, misprisions of treasons, or concealments of treasons, and done, perpetrated, or committed by any person or persons, out of this realm of England, shall be from thenceforth inquired of, heard and determined before the king's justices of his bench, for pleas to be holden before himself, by good and lawful men of the same shire where the said bench shall sit and be kept, or else before such commissioners and in such shire of the realm as shall be assigned by the king's majesty's"

1. Ander. 262. *Sett.* 49. But for a plain remedy, order, and declaration of this matter, it is enacted by 35. Hen. 8. c. 2. "That all manner of offences, being then already made or declared, or after to be made or declared, by any of the laws and statute of this realm, to be treasons, misprisions of treasons, or concealments of treasons, and done, perpetrated, or committed by any person or persons, out of this realm of England, shall be from thenceforth inquired of, heard and determined before the king's justices of his bench, for pleas to be holden before himself, by good and lawful men of the same shire where the said bench shall sit and be kept, or else before such commissioners and in such shire of the realm as shall be assigned by the king's majesty's"

“ jesty’s commission, and by lawful men of the same shire,
 “ in like manner and form to all intents and purposes, as if
 “ such treasons, misprisions of treasons, or concealments of
 “ treasons, had been done, perpetrated, and committed
 “ within the same shire where they shall be so inquired of,
 “ heard and determined, as is afore said.”

In the construction of this statute the following points have been resolved.

SECT. 50. FIRST, That if the court of king’s bench, or commissioners appointed in pursuance of the statute, after having taken an indictment of a foreign treason, remove into a different county from that in which the indictment was found, the (a) trial shall be by jurors returned from the first county. And this is most agreeable to the general course of the common law; which (b) requires, that indictments shall be tried by jurors of the same county in which they were found. (a) Sum. 204. 3. Inst. 34. (b) S.P.C. 90. Vide Dyer 286.

SECT. 51. SECONDLY, That the commissioners, and county for the trial of such treasons, are (c) sufficiently assigned by the king in pursuance of this statute, by his either writing his name to the commission that appoints them, or signing the warrant to the lord keeper for the commission. (c) Sum. 16. 205. 3. Inst. 11. The king cannot by his charter give judges a power to try in one county offences committed in another, Lord Mansfield. Douglas 796.

SECT. 52. THIRDLY, That a treason done by an (d) Irish man in Ireland, is triable in England according to the purview of this statute; for Ireland being out of the realm of England, a treason committed (e) in it is certainly within the letter of the act; and nothing within the letter of a statute made for enlarging the jurisdiction, and supplying the defects of the common law, shall easily be construed out of the meaning of it. And therefore it seems reasonable, that any offence which by 25. Edw. 3. or any other subsequent statute, either expressly extending to, or (f) received in Ireland, is equally treason in Ireland and England, may be tried here by virtue of this statute. (d) 3. Inst. 11. 1. And. 262. 263. Sum. 16. 205. 1. Hale 155. 11. Coke 61. 3. Keble 560. 566. Warner’s Case. (e) See B. 1. c. 17. f. 67. (f) 1. And. 203. 1. Sider. 357.

But if an offence be made treason by an Irish statute, which is not treason in England, I see not how it can be tried here; since being neither made nor declared to be treason by any law or statute of this realm, it is not within the description of the offences provided for by 35. Hen. 8. To which may be added, that offences beyond sea, to be tried here by virtue of that statute, are to be inquired of and determined in like manner as if they had been committed in such shire

wherein they shall be inquired of and determined; but if an offence which is treason in *Ireland* and not in *England*, had been committed in any *English* county, it is manifest that it could not be punished as treason.

(a) Dyer 360. Also it hath been (a) resolved, that no treason committed in *Ireland* by an *IRISH* PEER, is triable in *England*, because he is intitled to a trial by his peers, which cannot be had (7).

(7) Resolved by three judges in Dyer 360. Vide also O'Rourke's Case, 1. Anderson 262. But in the Case of Ed. Maguire, 1. St. Tr. 928. 1. Hale 155. 284. the resolution in Dyer is declared not to be law, and it was ruled that an Irish peer might be tried by a common jury in England for a treason committed in Ireland. Sed quære.

(b) 11. Coke 63. *SECT. 53.* FOURTHLY. That this statute is not (b) repealed by 1. & 2. Philip and Mary, c. 10. which enacts, Co. Litt. 261. "That all trials hereafter to be had, awarded or made, for 1. Hale 284. Summary 205. "any treason, shall be had and used according to the com- 3. Inst. 24. "mon laws of the realm, and not otherwise." For it is 1. Anderson 262. the manifest purport of this statute to restore the ancient S. P. C. 90. course of the common law as to the trial of treasons, in Dyer 131. 286. which great innovations had been made by statutes in the 298. 300. reigns of king *Henry the eighth* and *Edward the sixth*; but Hale 164. it cannot be thought agreeable to the intention of it to abrogate any statute, which in a doubtful case settled and confirmed the jurisdiction of the common law, and gave a method of trial as agreeable as possible to its usual and ordinary manner of proceeding.

† Also it is enacted by 2. Geo. 2. c. 21. "That where death shall happen in *England* from any cause feloniously given out of *England*; or where the felonious cause shall be given in *England* and the death ensue in any place out of *England*, an indictment thereof found by the jurors of the county in which either the death or the cause of the death shall respectively happen, shall be as good and effectual in law, as well against the principals and accessaries, as if the offence had been completed in the same county where such indictment shall be found, &c.

Vide Book the first, "MUR-
"DERS."
Sec Rex v.
Farrell, 1. Bl.
Rep. 459.

SECT. 54. It was a great doubt at the common law, (c) Whether an accessory in one county to a felony in another, were indictable in either. But this is remedied by 2. & 3. Edw. 6. c. 24. by which it is enacted, "That such an accessory may be indicted and tried in the same county wherein he was accessory."—But intending

(c) Keil. 67.
Dyer 38.

ing more fully to treat of this matter in the chapter concerning the Arraignment of the Principal and Accessary, I shall refer the reader thither for the farther consideration of it.

AS TO THE EIGHTH GENERAL POINT, viz. What ought to be the form of the Body of an indictment.

I shall endeavour to shew,

I. What ought to be the form of the body of an indictment at common law.

II. What of an indictment upon a statute.

As to the first of these particulars I shall endeavour to shew,

1. How the body of an indictment at common law ought to set forth the substance and manner of the fact.

2. How the persons mentioned or referred to in it.

3. How the thing wherein the offence was committed.

4. How the circumstances of time and place.

5. Where it may be vitiated by false, or improper *Latin*, or the use of *English* instead of *Latin*.

6. Where the offence indicted may be laid jointly and where severally, and where both jointly and severally, and where the offences of several persons may be laid in one indictment.

7. Whether the words *vi et armis* be in any case necessary.

8. Whether it be necessary to lay the offence *contra pacem*.

9. Whether it be necessary to lay it *contra coronam et dignitatem regis*.

10. Whether it be necessary to lay it *in contemptum regis*.

11. Whether it be necessary to lay it *illicitè*.

12. Whether a defect in any of these particulars be amendable.

As to THE FIRST POINT, viz. How the body of an indictment at common law ought to set forth the substance and manner of the fact, I shall endeavour to shew,

1. In what manner it ought to set them forth in relation to the offence of the principal.

2. In what manner in relation to the offence of the accessory.

As to the first of these particulars, viz. In what manner the body of an indictment at common law ought to set forth the substance and manner of the fact in relation to the offence of the principal; I shall observe,

Sec. 55. FIRST, That no periphrasis or circumlocution whatsoever will supply those words of art which the law hath appropriated for the description of the offence, as (a) *murdravit*, in an indictment of murder; (b) *cepit*, in an indictment of larceny; (c) *mayhemavit*, in an indictment of maim; (d) *felonciè*, in an indictment of any felony whatever; (e) *burglariter*, or *burgulariter*, or else *burgalariter*, in an indictment of burglary; (f) *proditoricè*, in any indictment of treason; (g) *contra legantiam suam delitum*, in an indictment of treason against the king's person (8).
 (a) C. 23. f. 77. Dyer 304. B. Indict. 7. Cro. Eliz. 920. (b) F. Cor. 119. Indict. 2. 8. B. Corone 76. 12. Affize 32. 2. Edw. 3. 1. C. 23. f. 77. (c) C. 23. f. 77. (d) 2. Ed. 3. 1. 3. 2. Ed. 3. 18. 1. F. Indict. 3. C. 23. f. 77. B. Indict. 36. B. Appeal 43. 218. Ed. 4. 10. C. Eliz. 193. 4. Coke 41. 5. Coke 121. An indictment of a scold must be laid *ad commune nocumentum* Strange 1246. See 9. Coke 69. (e) Dalton 22. Con. 4. Co. 39. Summary 207. 5. Coke 121. Cro. Eliz. 920. (f) Summary 11. 3. Inst. 15. F. Corone 55. S. P. C. 3. 3. Il. 7. 10. Carthew 319. (g) 3. Lev. 396. Calvin's Case 5, 6. 10. Skinner 442. Carthew 319. (8) *Fabricavit* denotes forgery, Strange 19.

Sec. 56. SECONDLY, That in an indictment, as well as (b) C. 23. f. 79. in an (h) appeal of rape, the fact seems to be sufficiently F. Indict. 18. ascertained by the words *feloniciè rapuit*, without adding 9. Ed. 4. 26. *carналиter cognovit*, or first setting forth the special manner of the terror or violence, and then concluding that the defendant *sic feloniciè rapuit*, &c. Also it seems, that the like general manner of setting forth the offence, which is sufficient in an (i) appeal of larceny, will also be sufficient in an (j) Sup. c. 23. f. 79. Let. Indictment (9). K.

(9) Vide 18. Eliz. c. 7. and the case of the King v. Lord at the assizes for Surrey, where Gould, J. held the indictment bad, because not stated under ten years of age. MS.

Sec.

Sec. 57. **THIRDLY,** That in other cases it is (*a*) generally a good rule in indictments as well as appeals, that the special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the Court, that the indictors have not gone upon insufficient premises.

(*a*) *C. Eliz.*
147. 207.
9. Ed. 4. 26.
2. Hple. 124.
125, 126.
3. St. Tr. 566.
Sacheverell's
Case. 2. Sed.
Case. 31. Vide
Strange 699.

And upon this ground it seems to be agreed, that an indictment finding that a person hath feloniously broken prison, without shewing the cause of his imprisonment, &c. by which it may appear that it was of such a nature that the breaking might amount to felony, is (*b*) insufficient.

(*b*) *B. Indict. 9.*
9. Ed. 4. 26.
Strange 1226.
1268.

Also (*c*) indictments against persons for refusing to be sworn constables, after they had been *legitimo modo electi*, have been quashed for not shewing the manner of the election, that it might appear to have been such as obliged the defendants to have undertaken the office.

(*c*) *Aleyn 72.*
79.
Strange 920.
1146.
1. Modern 24.
5. Modern 98.
129.

Comb. 416. Sup. c. 10. sect. 46. Douglas 534. 538. And see *Rex v. Burder*, Trinity Term, 32. Geo. 3. that an indictment that the defendant was appointed "over-fer of the poor of the parish of A," and that he afterwards refused "to take the said office of Overseer of the parish to which he was so appointed," is good, 4. Term Rep. 778.

Also it hath been (*d*) adjudged, that an indictment of burglary is insufficient without the word *noctanter*.

(*d*) *C. Eliz.*
583.

Also it seems to be (*e*) agreed, that an indictment charging a man with a nuisance in respect of a fact which is lawful in itself, as the erecting of an inn, &c. and only becomes unlawful from particular circumstances, is insufficient, unless it set forth some circumstances which make it unlawful. But it is said that this is needless where the thing indicted is unlawful in its own nature, as the keeping of a bawdy-house, &c.

(*e*) 2. Rol.
345.
Palm. 368.
374.

Also it hath been (*f*) adjudged, that an indictment for traitorously coining alchemy like to the king's money, without shewing what money, is insufficient; of which this seems to be the plainest reason, that it appears not whether it were made like to the king's gold or silver coin, or only like to that in brass or copper, &c. and if it were made like to that of the latter kind only, it (*g*) seems that the offence could not amount to treason.

(*f*) *F. Indict.*
10.
S. P. C. 95.
Summary 106.
Vide 2. Roll.
12.
(*g*) *B. 1. c. 17.*
1. 57.

Also it (*b*) seems, that an indictment of perjury, not shewing in what manner and in what court the false oath was

(*b*) *C. Eliz.*
137.
Rex v. Alyn,
taken, D. & E. 60.

taken, is insufficient; because for what appears it might have been extrajudicial, &c.

Also it seems clear, that it is necessary, both in indictments and (a) appeals of mayhem and murder, to set forth particularly in what manner the hurt was given, and that an omission thereof is not holpen by a general conclusion, that the defendant *sic felonice mayhemavit* or *murдавit*, &c. But having already shewn in the chapter of Appeals, with what certainty the count in an appeal of death must set forth the special manner of the fact, as by shewing in what (b) part of the body the wound was given, and the (c) length and breadth of such wound, and (d) that the party died of it; and with what (e) weapon it was given; and that the word (f) *percussit* cannot safely be omitted where the truth of the fact will bear it, I shall refer the reader to the said chapter of Appeals, for the learning relating to these points.

(a) Sup. c. 23. f. 79.
2. Lev. 140. 141.
Salkeld 377.
Farresly 16.
Kelyng 124.
(b) Sup. c. 23. f. 80.
(c) Sup. c. 23. f. 81.
(d) Sup. c. 23. f. 83.
(e) Sup. c. 23. f. 82.
(f) 1. Sid. 91.
Vide Rex v. Roll, Strange 999. Davy v. Baker, 4. Burrow 2471. Sed vide Reg. v. Wyatt, where on an indictment for not returning the warrant of two justices, the time when the warrant was returnable is not set out, Ld. Raym. 1195. But this was against the opinion of Holt C. J.

It hath been adjudged, that an indictment of extortion charging J. S. with the taking of fifty shillings as bailiff of a hundred, *colore officii*, without shewing for what he took it, is good at least after verdict, for perhaps he might claim it generally as being due to him as bailiff, in which case the taking could not be otherwise expressed. But this seems to be a special case (10).

(10) An indictment for procuring, &c. must shew the false tokens, Strange 1127. Vide 21. Hen. 8. c. 1. Also an indictment for words spoken of a justice in the execution of his office, must set out the words, 3. Com. Dig. 506. Also if it be for obstructing him, it must shew by what act it was done, Rex v. How, Strange 699. So an indictment that the defendant took a servant without a testimonial must shew a former service, Skinner 343. So for a contempt in not executing a warrant it ought to shew the nature of the warrant, 1. Ventris 305. Sed vide Ld. Raym. 1192. So for a forcible entry there ought to be a positive charge of a disseisin, Ld. Raym. 610.

SECT. 58. FOURTHLY, That an indictment charging a man disjunctively is void. As where it finds that *A. murдавit B. vel murdrari causavit*; or that *A. verberavit B. vel verberari causavit*; or that *A. (g) fabricavit talem cartam, vel fabricari causavit*; for here are distinct offences, and it appears not of which of them the indictors have accused the defendant.

(g) 5. Mod. 137, 138.
1. Salk. 342.
371.
Rex v. Flint, B. R. H. 370.
Rex v. Stroughton, Strange 909. Barnard K. B. 347. 2. Sess. Caf. 25.

Sec. 59. FIFTHLY, That (a) regularly every indictment (a) 1. Lev. must either charge a man with some particular offence, or else with several of such offences, particularly and certainly expressed, and not with being an offender in general. For no one can well know what defence to make to a charge so uncertain, or to plead it either in bar or abatement of a subsequent prosecution; neither can it appear that the facts given in evidence against a defendant on such a general accusation, are the same of which the indictors have accused him; neither can it judicially appear to the Court, what punishment is proper for an offence so loosely expressed.

And upon this ground it hath been adjudged, that an indictment is insufficient which only charges a man in general, with having (b) spoken divers false and scandalous words against J. S. being mayor of such a place;—Or with being a (c) common defamer, vexer, and oppressor of many men;—Or with being a common (d) disturber of the peace, and having stirred up divers quarrels as well among his neighbours as other of the king's subjects at such a place, to the great loss and disturbance of his neighbours aforesaid, and other the king's subjects, &c.—Or with being a (e) common oppressor and disturber of the peace;—Or with having been and still continuing to be a man of evil (f) behaviour;—Or with being a (g) common deceiver of the king's people;—Or with being a (h) common publisher of the king's secrets, and of his own, and of divers other persons impanelled together with him to inquire for the body of the county of divers felonies, against his oath, &c.—Or with being a (i) common forestaller;—Or with being a (k) common thief;—Or being a (l) common evil-doer;—Or with being a common (m) champertor;—Or with being a common (n) conspirator, and such like (11).

(g) 6. Mod. 311. (b) Moor 302. (i) F. Aft. sur le Stat. 26. Moor 302. (k) 2. R. Ab. 79. Moor 302. 22. Affize 73. (l) 22. Aff. 73. (m) 29. Aff. 45. (n) 29. Aff. 45.

(11) Or *quia male et negligenter se gessit* of the office of a constable is too general, Strange 2; or for deceiving one D. of several lottery orders, viz. *de scriptis bonis et catallis* of D. *decipiebant et defraudabant*, Strange 8; or of a clerk of a market that he did cause his agents illegally to receive of several persons, several sums, &c. Rex v. Robe, Strange 999. So in a declaration "that the defendant did receive a gift "or reward," without specifying it, is too general, Davy v. Baker, Burr, 2471. So an indictment on 5. Eliz. for exercising a trade, &c. "in Great Britain," is too general, Rex v. Lister, Strange 732.

It is holden indeed in a note of *Fitzherbert's Abridgment*, that an indictment for confederacy in general is good, but this is made a *quære* by the reporter of the (a) *Year Book*; from which the said note in *Fitzherbert* is taken, and is denied to be law, both by (b) *Brook* and (c) *Rolle*; nor do I any where find the least reason offered to distinguish this from the other cases abovementioned.

(d) 3. Inst. 41. Also it is holden by *Sir Edward (d) Coke*, that the ancient form of indictments, charging men with having, as hereticks and traitors, and infeildors of the highways, conspired and confederated, &c. to destroy the catholick faith, and having daily published false and seditious writings, &c. were utterly insufficient, and yet such indictments seem to have been (e) frequent; as were also indictments charging men in general, as *insidiatores viarum, et depopulatores agrorum*; which (f) words took the benefit of clergy from the persons indicted, before the statute of 4. Hen. 4. c. 2. by which it is enacted, "That these words shall no more be put in-
(g) to indictments, nor if they be, shall have such effect as to
" take from the persons indicted the benefit of clergy." (g). And this statute in this respect seems to be in affirmance of the common law, which seems generally to disallow of such uncertain indictments, as appears from the reasons and authorities above set forth.

Yet it hath been adjudged, that a man may be generally indicted as a *common barrator* against the (b) form of the statute, and (i) against the peace, without shewing any of the particular facts in the indictment, by which he (k) appears to have been so; for barratry is an offence of a (k) complicated nature, consisting in the repetition of divers acts in disturbance of the common peace, all of which it would be too prolix to enumerate in the indictment; and therefore (l) experience hath settled it to be sufficient to charge a man generally as a *common barrator* (which is a (m) word of art appropriated to this purpose), and before the trial to give the defendant a (n) note of the particular matters which you intend to prove against him.

(o) Vide B. 1. Also it is (o) holden, that there is no need to name any particular place where the defendant was a barrator, because he shall be supposed to have been guilty in divers places, and the *venire* is most proper from the body of the county. Also it is said, that there is no need in the conclusion of such an indictment to lay the offence *ad nocu-
mentum*

mentum omnium ligeorum, &c. but that (a) *diversorum* is (a) 1. Keble sufficient in such an indictment as well as in an indictment of a *common scold, &c.* because it appears from the nature of the thing, that it could not but be a common nuisance (1). 409.
Sec B. 1. c. 75.
f. 5.

(1) An indictment against a scold must be laid *ad commune nocumentum*, Rex v. Cooper, Strange 1246.

Also it seems to be (b) agreed, that an indictment against one as a *common scold*, is good without setting out the particulars, for the same reasons that such indictment of *barratry* is good. (b) 6. Mod.
311.
B. 1. c. 75. f. 5.
Strange 1246.
See also Rex
v. Higginson,
in the case of

3. Burr. 1233, and Lord Hardwicke's observations upon this subject in the case of Clarke v. Periam, 2. Atkins 340.

SECT. 60. SIXTHLY, That the charge must be laid positively, and not by way of (c) recital, as with a *quod cum, &c.* and that the want of a direct allegation of anything material in the description of the substance, nature, or manner of the crime, (d) cannot be supplied by any intendment or implication whatsoever (e). And upon this ground it seems to be (f) generally holden, that an indictment of death having the words *felonice murdravit, &c.* cannot amount to an indictment of murder, without the words *ex malitia præcogitata*; and yet by the word *murdravit* it expressly charges the party with murder, and it is impossible that there could be a murder, and no malice prepenſe. (c) Salk. 372.
3. Modern 53.
Ld. Raym.
1363.
1. Burrow 402.
(d) 5. P. C. 96.
C. Jac. 20.
4. Coke 42.
5. Coke 120.
(e) 1. Vent.
268. 337.
(f) Dyer 99.
Summary 231.
2. Hale 187.
Con. Dyer 68.

Vide 2. Lev. 140, 141. 4. Coke 41.

Also it seems to be generally agreed, that no indictment of death can be good without an express allegation, that the deceased both received the hurt which is laid as the cause of his death, and also that he died of the hurt so received; and that the want thereof cannot be made good by any implication whatsoever, as hath been more fully shewn c. 23. sect. 82, 83. See Ladd's
Case, Cases
in Crown Law
91.

Also it hath been (g) adjudged, that an indictment against J. S. for feloniously breaking such a prison, and commanding J. N. who was therein imprisoned for felony, to escape, is not a good indictment for a felonious breaking, without expressly shewing that J. S. did escape, and yet the breaking is expressly laid to be felonious, and it is impossible that it could be so, unless the party did escape. But it will be needless to enumerate any more instances of this kind, which are so very frequent, that there is scarce any case which mentions exceptions taken to indictments, without (g) Keil. 87.
Vide sup. c. 18.
f. 12.

out

out having some or other grounded on this rule, *That in an indictment nothing material shall be taken by intendment or implication.*

Yet the law will not admit of too great a nicety of this kind; for it hath been adjudged, that if in the first part of an indictment of death, the assault be laid with malice prepense, &c. there is no (a) need to repeat it in the following clause, which shews the giving of the wound, being joined with a copulative to the precedent sentence, and laid at the same time and place with the assault.

(a) 4. Coke 41.

(b) C. Jac. 473.

Also it hath been (b) adjudged, that where an indictment sets forth, that J. S. was lawfully arrested by virtue of a plaint before such a sheriff, &c. it shall be intended that there was a good warrant.

(c) 9. Coke 67.

8. Coke 120.

Vide also

1. Burr. 333.

Also it hath been (c) adjudged, that where a warrant is alledged, authorising the arrest of J. S. within the liberties of London, and the indictment lays the execution of it in such a parish and ward in London, without expressly laying the parish and ward within the liberties of London, yet the indictment is good; for the Court will not admit of such a strained exception, that a parish in London may be out of the liberties of London.

(d) C. Jac.

610.

1. Modern 128.

Moor 606.

2. Levinz 229.

2. Roll. 226.

Ld. Raym.

378.

1. Keble 852.

Rex v. Boyal,

Burrow 832.

(e) B. 1. c. 64.

f. 38.

C. Jac. 610.

2. Roll. 226.

2. Levinz 229.

2. Mod. 129.

Vide Rex v.

Bootie, Bur-

row 864.

Rex v. Ham-

mond,

Strange 44.

Self. 61. Also it hath been (d) adjudged, that where an indictment finds that J. S. *existens* of such or such a degree or trade, &c. as brings him within the purview of the law whereon the indictment is founded, committed such a fact, it shall be intended that he was of such degree, &c. at the time of the fact, without any express allegation to that purpose, because that is the most natural construction of the participle *existens*, going before the verb to which it is the nominative case. (e) Yet where an indictment of forcible entry finds that A. disseised B. of such land *existens liberum tenementum* of B. it seems agreed, that the indictment is insufficient, because it stands indifferent, according to the common rules of construction, whether the land were the freehold of B. at the time of the *disseisin*, or at the time of the finding of the indictment, the word "*existens*" not being the nominative case to the verb, but applied to the thing which was the subject of the action. But I cannot find any certain general rule, whereby it may be known in what cases an exception of this kind shall be taken to be too over-nice, that the Court will not regard it. All therefore that I shall add on this head is this, that as on the one hand the law will not suffer a man to be condemned of any crime whereof the jury have not expressly found him guilty,

guilty, by any argument or implication from what they have so found; so on the other hand it will not suffer a criminal to escape on so trifling an exception, which it would be absurd and ridiculous to take notice of; for *nimia subtilitas in jure reprobatur*. But the judgment hereof cannot but be in a great measure left to the discretion of the Judges, who from the circumstances of each particular case, the comparison of precedents, and the plain reason of the thing, seem always to have endeavoured to go within these rules as nearly as possible.

Señ. 62. SEVENTHLY, That it is a certain rule, that where one material part of an indictment is repugnant to another, the whole is void; for the law will not admit of such nonsense and absurdities in legal proceedings, which, if suffered, would soon introduce barbarism and confusion. Also it takes off much from the credit of an indictment that those by whom it is found have contradicted themselves.

And upon this ground it hath been adjudged, that if an indictment (a) charge the defendant with having forged a certain writing by which A was bound to B. which is impossible, if the writing were forged; or if an indictment of forcible entry set forth, that the defendant disseised J. S. of lands, wherein it appears by the indictment itself that he had no freehold whereof he could be disseised; or that the defendant entered peaceably on J. S. and then and there forcibly disseised him; or that he disseised him of land then being and ever since continuing to be his freehold; (b) every such indictment is void, for its manifest inconsistency and repugnancy.

And upon the like reason it hath been adjudged, that an indictment of death, laying the stroke at A. and the death at B.; or the stroke on the first of May, and the death on the tenth; and then concluding that the defendant in such manner murdered the party at A. aforesaid, or on the first of May aforesaid, is insufficient for the repugnancy, as hath been more fully shewn in the (c) chapter of Appeals; because it supposes the murder to have been committed at a place in the first case, and on the day in the second, in which it appears, by the indictment itself, that the party was not killed but only wounded.

Also it hath been (d) adjudged, that an indictment for selling iron with false weights and measures, is void, only because it is absurd to suppose that iron could be sold

by measure, but also because it is repugnant and inconsistent that it should be so sold at the same time when it was sold by weight.

Also if an indictment at a sessions holden the thirteenth of January, in the thirteenth year of *Charles the Second*, find that the defendant, has been absent from church six months from the first of January, in the thirteenth year of *Charles the Second*, it is (a) agreed, that it is void for the impossibility, for there are but eleven days between the first of January and the holding of the sessions.

(a) Raym.

434.

Par. Case,

3. Keble 653.

Vide 1. Term

Rep. 316.

(b) 12. Ass.

32.

F. Corone

171.

Indictment 9.

B. Corone 76.

b. 1. c. 33.

f. 21.

(c) 2. R. Abr.

81.

Parallel Cases, 2. R. Abr. 81. Vide 18. Ass. 15.

Also if an indictment charge a man with having feloniously done a fact, which appears upon the face of the indictment to have been but a trespass, as with feloniously cutting down and carrying away trees, the Court will (b) not arraign him; yet where the sense appears plain, the Court will often dispense with a small impropriety in the expression; as where one is indicted for having mowed *unam acram fœni*, which is (c) said to be sufficient, and yet that which was mowed, could not, at the time of the mowing, be, in strictness, called hay, but grass only.

As to the second particular, viz. In what manner the body of an indictment at common law must set forth the substance and manner of the fact, in relation to the offence of the accessory; I shall observe,

Sec. 63. FIRST, That a repugnancy in setting forth such offence is equally fatal as in setting forth that of the principal; and therefore if an indictment of death which lays the stroke on one day, and the death on a subsequent one, charge the accessories with having abetted the fact at the time of the felony and murder only, it is insufficient, as hath been more fully shewn in the (d) chapter of Appeals; because it appears by the indictment itself, that the time of the death, and consequently of the murder, was subsequent to that of the stroke, and therefore it is repugnant to alledge that the defendant abetted the stroke by being present at the time of the

(d) C. 23. f.

88, 89.

Supraf. 64.

(e) Sum. 265.

9. Coke 67.

Plowden 97.

1. Hale 437.

(f) Sup. c. 23.

f. 75.

Sec. 64. SECONDLY, That where several are present, and abet a fact, and one only actually does it, an (c) indictment may, in the same manner as an (f) appeal, either lay it generally, as done by them all, or specially, as done only by the one and abetted by the rest. But it hath been resolved, that if an indictment barely charge a

man

man with having been present when a murder was committed, it is (a) void; because a man may be innocent^{31.} present, and shall not be presumed to have been a party, where no circumstance is found that makes him so. (a) 14. H. 7. B. Indict. 5. Foster 351.

Seet. 65. Also it hath been (b) adjudged, that an indictment of *J. S.* as accessory to four, by these words, "that *J. S.* *sciens ipsos quatuor homines feloniam prædictam fecisse apud D.* *felonice recepit*," is naught for not saying "*eos recepit*," for it doth not appear how many of them the indictors have found him to have received, whether all four, or three, or two, or but one. (b) 30. H. 6. 2. F. Indict. 13. S. P. C. 95. Summary 206.

Seet. 66. It hath been (c) holden, that an indictment charging a constable with having voluntarily and feloniously suffered a person arrested by him upon suspicion of felony to escape, without shewing what the nature of the felony was, and that it was actually committed, is void for the uncertainty, not only because it appears not but that the offence of which the party was suspected, was never actually committed, in which case the escape could (d) not be criminal; but also because it appears not what the felony was, and unless the arrest were for a felony, the escape could not be felonious. (c) C. Eliz. 752. Hetley 53. 8. Edw. 4. 3. S. P. C. 95. F. Indict. 16. Vide F. Corone 45. 76. (d) Sup. c. 12. f. 16, 17. c. 18. f. 7. c. 19. f. 2, 3. Str. 1226. 1268. 3. Peer. Wms. 497.

But it is said, that an indictment for knowingly receiving persons outlawed for, or convicted of felony, or for knowingly suffering such persons to escape, (e) may be good without shewing what the felony was, or that it was actually committed, if the record of the outlawry or conviction be set forth with convenient certainty: and the most plausible reason of this opinion seems to be this, that it may be sufficiently made out by such record, of what kind the felony was, and also that it was actually committed, &c. It is holden indeed by *Sir William (f) Staundford*, that such a general indictment for receiving a person outlawed for felony in the same county wherein he dwells is good, but not if it were in another, because a man is bound at his peril to take cognisance of an attainder of felony in his own county, but not in another. But I much question the authority of this distinction, since, as the law seems now to be (g) holden, a man is no more bound to take cognisance of such an attainder in his own county, than in any other. (e) 8. Ed. 4. 3. F. Indict. 16. Qu. Keilw. 194. (f) S. P. C. 96. Vide F. Cor. 577. Dyer 355. (g) Sum. 218. See Ld. Hardwick's opinion 3. Peer. Wms. 495.

Seet. 67. It hath been (h) holden, that an indictment finding that *J. S.* *sciens receptavit* such a one being a felon is not good, for this reason among others, because it doth not expressly find, that *J. S.* knew the person so received. (h) 7. H. 6. 42. B. Indict. 4. F. Indict. 11. 3. Keble 760. S. P. C. 96.

by him to have been a felon. But this is contradicted by other (a) authorities, by which it is holden, that the word *scienter* in such a case shall be construed to go through the whole sentence.

(a) 2. Lev. 208.

8. Ed. 4. 3.

1. D. An.

Abri. 19.

3. Modern 129. Strange 75. Vide Rex v. Lawky, Strange 904. Barnard K. B. 263. Fitzgib. 122. Rex v. Bunce, Andrews 162. 1. Burr. 846.

As to THE SECOND POINT, *viz.* In what manner the body of an indictment at common law must describe the persons mentioned in it, I shall endeavour to shew,

1. In what manner it must describe the defendant.

2. How persons mentioned or referred to in the indictment.

As to the first particular, *viz.* In what manner an indictment must describe the defendant.

Sett. 68. It is said, that an indictment that the king's highway in such a place is in decay through the default of the inhabitants of such a town, is (b) good without naming any person in certain.

(b) 2. Roll.

Ab. 79.

Wood 620.

Also it is said, (c) that no indictment can take any advantage of a mistaken surname in the indictment, either by plea in abatement, or otherwise, notwithstanding such surname hath no manner of affinity with his true one, and he was (d) never known by it. And in this respect, an indictment differs from an appeal, whereof it is (e) certain that a misnomer of a surname may be pleaded in abatement, as well as any other misnomer whatsoever.

(c) 1. H. 5. 5.

Summary 243.

S. P. C. 181.

B. Misno. 9.

Vide 3. H. 6.

25, 26.

Thel. b. 11.

c. 5. f. 14.

Sed vide

B. R. H. 303.

(d) Q. Kely. 11, 12. 2. Hale 238. (e) 1. H. 5. 5. Rastal 50. 54. Summary 243.

2. Hale 175. 238. 6. St. Tr. 237. Ante 183. f. 143.

Sett. 69. But I do not find but that every other misnomer of the defendant, except that of the surname, and also every defective addition, are as fatal in an indictment as in an appeal; for it seems generally to be (f) holden, that a misnomer of the defendant's name of baptism may be pleaded in abatement of an indictment.

(f) Thel. b.

11. c. 5. f. 12.

11. H. 4. 41.

F. Corone 88.

Misnomer 18. Summary 243. Con. 3. II. 6. 25. B. Misno. 6.

Also it hath been (g) adjudged to be a good plea in abatement of an indictment against one by the name of Sir J. S. knight, that he is a baronet and no knight.

(g) Cro. Car.

p. 371.

1. Jones 346.

Also it hath been (*a*) holden, that it is a good plea in (*a*) 1. Leon. 248, 249. abatement of an indictment against GARTER king at arms, that he is not called GARTER in the indictment, because it is a name of dignity, being given him by the words *creamus, coronamus, et nomen imponimus*; and from the reason of this case it seems plainly to follow, that the omission of any other name of (*b*) dignity may be pleaded in abatement of an indictment: (*c*) and if so, why should not the omission of the defendant's name of baptism be equally fatal? (*b*) Vide sup. c. 23. f. 103, 104. Shower 392, 393. Skinner 517.

2. Hale 240. Tremain 12. Carthew 299. 3. C. Dig. 502. 2. Inst. 668. (*c*) Vide c. 23. f. 103. Keilw. 25, 26. Fitz. Cor. 88. Qu. Palmer 195. 3. Bac. Ab. 104. 2. Hale 175. Cro. Jac. 609. B. R. H. 303. 2. Hale 238. 6. St. Tr. 230.

Secl. 70. It seems to be agreed, that notwithstanding an indictment be the suit of the king, yet being within the express letter of the statute of 1. Hen. 5. c. 5. concerning additions, set forth more at large in the chapter of (*d*) Appeals, it (*e*) cannot be construed to be out of the meaning of it. From whence it follows, that the want of a sufficient addition, within that statute, is as good an (*f*) exception to an indictment, if (*g*) process of outlawry lie on it, as it is to an appeal. (*d*) Sup. c. 23. f. 105. (*e*) B. Add. 50. L. Quin. Ed. 4. 33, 34. Finch 234. (*f*) B. Add. 23. 41.

1. Leon. 183. Shower 392. 9. Edw. 4. 48. Dyer 46. (*g*) C. Eliz. 32. 148. C. fac. 531.

Also it hath been adjudged, that it is a (*h*) fatal fault to apply such addition to the name which comes under the *alias dictus* only, and not to the first name: but it is said not to be material (*i*) whether any addition be put to the name which comes under the *alias dictus* or not, because what is so expressed is not material. But it is so great a fault to put no addition to the first name, that where several are indicted, such an omission, in respect of one of them, makes the indictment (*k*) vicious as to all. And it may be probably argued, that there is the same reason for the like fault in an appeal against divers, to abate it also as to all; but I do not find this point (*l*) expressly agreed. But it seems clear, that generally the law is the same in relation to additions in indictments and appeals. (*h*) S. P. C. 68. 2. Hale 177. 2. Inst. 669. 2. Leon. 183. 30. H. 6. C. Eliz. 583. Vide Dyer 88. 1. Edw. 4. 1. Sayer 280. Semple's case, O. B. June sess. 1786. Cases in Crown Law. (*i*) 30. H. 6. S. P. C. 68. (*l*) Vide sup.

F. Process 103. 1. Ed 4. 1. (*k*) 1. Bulst. 183. Contra 2. Hale 177. (*l*) Vide sup. c. 23. f. 127. F. Count. 18.

Having therefore already treated in the chapter of Appeals of the general learning relating to this subject, and shewn that an addition in (*m*) *English* is as good as in *Latin*; and that where several defendants have the same addition, it (*m*) Sup. c. 23. f. 106.

- (a) Sup. c. 23. is (a) safest to repeat it after each of their names; and
 1. 106.
 (b) Sup. c. 23. that the son being of the same name and addition with the
 1. 106.
 (c) Sup. c. 23. father, ought to be distinguished with some (b) farther de-
 1. 107. to 113. scription; and having also shewn what is a sufficient addi-
 (d) Sup. c. 23. tion of the (c) estate, or degree, or (d) mystery, and also of
 1. 113. to 118. the (e) town, hamlet, place and county of the defend-
 (e) Sup. c. 23. ant; and also how the defect of an addition may be (f)
 1. 118. to 124. salved by the appearance and plea of the defendant, I shall
 (f) Sup. c. 23. refer the reader for all these particulars to the chapter of
 1. 124. Appeals.

As to the second particular, viz. In what manner the body of an indictment at common law must describe the other persons besides the defendant mentioned or referred to in it.

- Sec. 71. It is certainly safest to describe them with convenient certainty, which will hardly be dispensed with except in special cases, and for special reasons. For those general indictments which (g) anciently seem to have been allowed for suffering divers bakers to bake, &c. against the
 (g) 38. Affize
 21. 22.
 B. Prefent. 27.
 (h) B. Indict.
 21.
 2. R. Abr. 30.
 (i) Shower
 389, 390.
 Sec. 71. It is certainly safest to describe them with convenient certainty, which will hardly be dispensed with except in special cases, and for special reasons. For those general indictments which (g) anciently seem to have been allowed for suffering divers bakers to bake, &c. against the affize, &c. or for distraining divers persons without cause, &c. have by the later (h) authorities been holden insufficient for their uncertainty in not naming some persons in particular who were so suffered to bake, or distrained, without which the Court cannot so well know what fine will be proper; nor can the defendant be so well enabled to make his defence, nor to plead the indictment to a subsequent prosecution. And for the same reasons among others, an (i) indictment for taking divers sums of divers persons for such a toll at such a rate, without naming any persons in particular, hath been adjudged naught.

- Yet where in common presumption it may be very difficult, if not impossible, to know the names of the persons referred to in an indictment, it (k) may be good without naming any of them; (l) as where one is indicted for having knowingly received and harboured divers thieves, to the jurors unknown. In which case, such a general charge is maintainable from the necessity of the thing; for otherwise a notorious offender of this kind might be wholly dispensable, for want of the jurors knowing the names of the persons so received, and yet might be publicly known to carry on such a practice, to the common nuisance of the country; in which respect it cannot but be reasonable in such a case to punish him, though not as an accessory to the thieves without shewing that he had received some of them in particular.

And for the like reason, if a (a) stranger, unknown to the country, be found slain, or if the dead body of a person who was well known, be disfigured in such a manner by its wounds, that no one can discover whose it was, it is certain that an indictment against the offender, for having killed *quendam ignotum*, will be good.

Plowden 85. 129. 9. H. 6. 45. b. Dyer 99. 285. Vide F. Cor. 146. 183. Noy 85. Sup. c. 23. f. 78.

(b) And upon the same ground, if a stranger unknown to the country be robbed, and will not come in to prosecute, nor discover his name, it seems clear, that an indictment against the offender for having robbed *quendam ignotum* is good. And if goods be found upon one notoriously suspected of felony, of which he can give no manner of account, as where a highwayman is apprehended with his pockets full of watches and rings, it seems, that he may either be indicted for stealing such watches and rings, being the goods of *quorundam ignotorum*, or, as some (c) say, for stealing them generally. Also in the indictment of the regicides for the murder of King *Charles the First*, it was (d) agreed, that the fact was well laid, as done *per quemdam ignotum* with a vizard on his face. And if one steal the goods of an abbey, &c. during a vacancy, he may be indicted for stealing (e) *bona ecclesie*, and yet the church can have no property. But these seem to be special and extraordinary cases, depending on particular reasons, and grounded on manifest necessity, without which it seems that such indictments cannot be maintained.

F. Indict. 15. S. P. C. 95.

It seems to be taken as a ground in (f) many books, that regularly the persons offended, as well as the defendant, ought to be certainly described in every indictment. And agreeably hereto it hath been (g) adjudged, that an indictment for stealing *quendam peciam panni linei cujusdam J. S.* without adding *de bonis et catallis cujusdam J. S.* is insufficient, because it doth not expressly appear to whom the goods stolen did belong. Also it was anciently (h) holden, that where one is indicted for the death of a person unknown, the inquest ought to tell his name to the Court; but surely this must be intended where they have some means to know it. However, from the whole, thus much seems plainly to follow, that wherever the person injured is known to the jurors, his name ought to be put into the indictment. And therefore, as I take it, those (i) books which seem generally to allow of indictments of killing, or robbing persons unknown, are to be understood with this

(a) Sum. 95. limitation, that such indictments are then good when the party is in truth unknown to the jurors. And agreeably hereto, others (a) who speak more fully of the matter seem plainly to go upon the necessity of the several cases; and the want of such necessity seems probably to have been the best reason why indictments not shewing to whom the wrong was done, were disallowed in some of the old (b) books. However, it is certain, that an appeal for the death or the robbery of a person unknown, is in no case good, as hath been more fully shewn in the (c) chapter of Appeals,

(d) Keilw. 25. *Seff. 72.* It hath been (d) adjudged, that an indictment for an assault on JOHN *parish-priest of D.* in the county of C. is good without mentioning his surname; for if a wrongful surname of the defendant himself will not vitiate an indictment, as hath been more fully shewn *Seff. 69.* surely *a fortiori*, the omission of the surname of any other person will not vitiate it; especially where such person is otherwise described with such certainty that it is impossible to mistake him for any other. But if an indictment for a wrong done to a person well known describe him only by his name of baptism, without some addition to distinguish him from others of the same name, it seems (e) questionable, whether it be not insufficient for the reasons given in the foregoing section. It is (f) said indeed, in a short note of a case in *Moor's Reports*, that an indictment against one Cole, *quod burglariter domum cujusdam Ricardi fregit*, was adjudged good without the surname; and it not being there mentioned that there was any other description of the party but by his name of baptism, it may be argued that that alone is sufficient. But to this it may be answered, that the only point taken notice of as adjudged, is that the surname is not necessary, and perhaps in the record at large there might be some addition. But granting that there was none, yet the authority of this case is the less to be regarded, because of the books cited to support it, (g) two seem to be directly against it, and the (h) third, which is most to the purpose, only proves that an indictment for stealing the goods *cujusdam i noti* is good, which seems by no means to come up to the point in question, as hath been more fully shewn in the precedent section.

Yet, however the law may stand in relation to such an uncertainty, it seems to be (i) agreed, that a repugnancy or absurdity in the description of the person injured will vitiate

(i) Lamb. b. 4. c. 5. p. 495.
Edw. 4. 2.

F. Indict. 17. B. Indict. 6. S. P. C. 95. Vide C. Car. 465.

an indictment; as where one is indicted for stealing *bona prædicti* *J. S.* where no *J. S.* was mentioned before (12); for though in civil actions the word *prædictus* hath been sometimes (a) rejected, as surplus and void, where it could be referred to (b) no certain antecedent, yet this may perhaps chiefly depend on the *statutes of Jeoffailes*, which in many cases help defects in form in civil actions, but extend not to criminal cases, wherein the greatest exactness is required; and if an award may be defeated by appointing a (c) payment on a certain day before mentioned, where no such day was mentioned before, it cannot well be imagined that the like inconsistency will be less fatal in a criminal proceeding.

(a) 3. Lev. 436.
C. Eliz. 709.
(b) Vide C. Jac. 549. 550. 585. 586. 618. Yelv. 26. 112. C. Eliz. 652.
(c) C. Jac. 149. 1. R. Abr. 254. 263. Yelv. 97, 98.

(12) *Francis Morris* was indicted as a receiver. The indictment stated, "he the said *Thomas Morris* well knowing, &c." But the indictment was held good, and the words "*he the said Thomas Morris*" rejected as surplusage. *Morris's Case*, Cases in Crown Law 103. But where an indictment contained two counts, one for stealing a bank note, and the other for stealing a pocket-book, and the same indictment charged *Mary Graham* with knowingly receiving them, and the stealers were found guilty on the last count only, and *Mary Graham* was found guilty of the offence *as aforesaid*; this was held bid, for it is uncertain to which offence the finding refers. *Graham's Case*, C. 113. Cr. w. L. w. 82. So also on an information charging two distinct offences, if the offender is convicted of the *first offence*, it is insufficient. *Rex v. Salamans*, 1 Term Rep. 149.

Sec. 73. It hath been (d) adjudged not to be necessary (d) 4 Coke 43. in an indictment of death to alledge that the person killed was in the peace of God, and of our Lord the King, &c. though such words are commonly put into indictments, for they are not of substance, and perhaps the truth might be that the party was at the time actually breaking the peace.

AS TO THE THIRD POINT, *viz.* In what manner the body of an indictment at common law must describe the thing wherein the offence was committed.

Sec. 74. It seems clear that no indictment can be good which wants a convenient certainty of this kind. And therefore it is (e) said, that an indictment for forging a lease of certain lands, without naming some one certain parcel, is insufficient. Also it seems to be agreed, that an (f) indictment for stealing *bona et catalla J. S.* without any farther description of them, is void for its uncertainty, for the like reasons for which indictments charging a man with being an offender in general are void, as hath been more fully set forth in the fifty-ninth section. And upon the like ground it hath been (g) adjudged, that an indictment (g) 1. R. Abr. 81.

(e) Hob. 272. Burrow 1127.
(f) Dalton c. 131. Lamb. B. 4. c. 5. f. 496. 2 Hale 282. Rex v. Powell, Strange 8.
(g) 1. R. Abr. 81.

5. Modern 38. Dalton c. 131. Parallel Cases B. 1. c. 64. f. 37.

- (a) 2. R. Ab. 80.
 2. Bulstrode 119.
 Parallel Cases B. 1. c. 76. f. 48.
 (b) Cro. Car. 380, 381.
 Vide 2. Bulst. 317.
 Shower 389, 390.
 (c) 1. Roll. 134, 135. (d) C. Eliz. 754. (e) 2. R. Abr. 80. or for *diversas quantitates cervise*. Rex v. Gibbs. Strange 497.

- (f) 2. Keble 178.
 1. Levinz 203.
 Skinner 343.
 Ld. Raym. 1363.
 B. R. H. 370.
 Andrews 162.
 Vide Burr. 336, 1232, 1233, 832, 864.
 Strange 228.
 849, 497, 900.
 552, 788, 699.
 3227, 1127.
 6. Com. Dig. 355. 3. P. Will. 419. (g) Vide Poph. 208.

Sec. 75. If the indictment be for a larceny or trespass on a living thing, as an ox, sheep, or horse, &c. it seems to be holden by (b) *Lambard* and (i) *Dalton*, that it is most proper to express to whom the property of it belonged, by calling it respectively the ox, sheep, or horse of the party injured, without using the words *bona* or *catalla*; but that it is proper to use these words, where the thing taken was not a living creature.

- (k) Lamb. B. 4. c. 5. f. 497, 498.
 1. Hale 187.
 Vide Cro. Ja. 120.
 Also it is holden by (k) *Lambard*, that it is proper to shew the worth of all living things, and also of such dead things as are sold by weight or measure, by expressing that they are of such a price; and the worth of other dead things, by expressing that they are of such a value; yet no instance is produced where any indictment has been disallowed in either case for a variance from these rules.

- (l) Crompt. 247, 248.
 And as to the first of them it is farther observable, that the (l) precedents in *Crompton* of indictments for stealing of horses and oxen, expressly alledge the horse and ox stolen

de bonis et catallis cuiusdam, 7. S. &c. Also an appeal of stealing sheep in *(a) Rastal's Entries* expressly alledges them *(a)* Rast. Ent. 55.
de bonis et catallis of the appelland.

And as to the second of the rules abovementioned, it is observable that the directions in *the (b) Register* concerning *(b)* Register this matter, which seem to be the chief foundation of the 95. said rule, are thus expressed, "That in a writ of trespass of *(c)* Vide Re-
 "immoveable chattels, the writ shall say, *tants de chatteux* gister 93. in
 "ad valentiam X. S. But if it be brought of a moveable *warrena fu-*
 "chattel, it shall say, *pretii X. S.* and *non ad valentiam.*" *gata, &c.* and
 Yet it appears by *the Register* itself that even in writs of *that de parco*
 trespass concerning which these directions are given, the *fracto, and*
 worth of the things taken away is sometimes omitted for the *94. a. in the*
(c) whole, and sometimes for *(d)* part." And it is said to *writ de equo*
 have been *(e)* adjudged, that such writs are good notwith- *et catallis ar-*
 standing such omissions. Also where things moveable and *restatis, 94. b.*
 immoveable are mentioned together in the same writ, the *in the writ de,*
 worth of all of them together is sometimes *(f)* expressed *averius impar-*
 under the words *ad valentiam, &c.* And sometimes the *catis, &c.* and
 worth of moveable chattels, as that of *(g)* corn in a granary, *in that de*
 &c. of *(h)* wine in a vessel, and of *(i)* wool, is expressed *transgressionis*
 under the words *ad valentiam.* *facta uxori,*
 &c. and 96. b.
 under the words *ad valentiam.* *in that de equo*
perchasso, and
97. a. in that

de ovibus fugatis, &c. *(d)* Register 93. b. in the writ *de clauso fracto arboribus*
succis, 94. b. in the writ de domo fracta, &c. and in the writ *de jumento, &c. fugatis*
 and in that *de equis imparcatis,* and 95. b. in that *de palis, &c.* and in that *de piscaria*
piscata, &c. and in that *de domo fracta, &c.* and 96. a. in that *de ovibus torfis, &c.* and
 96. b. in that *de warrena jugata, &c.* and 97. a. in *de porcis fugatis, &c.* *(e)* Regi-
 ster 97. Vide Cro. Jac. 130. 1. Sid. 39. 150. *(f)* Register 94. a. in the writ *de*
piscaria piscata, &c. and 95. b. in that *de piscia piscata, &c.* and in that *de domo*
fracta, &c. and 96. *de cunctis flagit.* *(g)* Reg. 95. b. in the writ *de bladis inun-*
diatis, &c. and 96. a. in that *de clauso fracto, &c.* *(b)* Register 95. b. in the writ *de*
quero, &c. *(i)* Register 15. and in the writ *de ovibus torfis, &c.*

From all which it seems to *(k)* appear, that the said *(k)* Vide F. N.
 directions are not necessary to be observed even in writs of B. 83.
 trespass, concerning the form whereof they are expressly Cro. Jac. 130.
 given, and that it is not material whether the words *ad va-* 1. Sid. 39. 150.
lentiam or *pretii* are used, or whether any value be set on 121. 15.
 the things taken away or not. And if so, why should it be 2. Hale c. 183.
 a greater fault not to observe the said directions in indict-
 ments, which are *(l)* not tied to the strict forms of writs? *(l)* Q. Dyer
 Therefore from the whole it seems *(m)* questionable, whe- 4. 26.
 ther it be needful to set forth *the value* of the goods in *(m)* See Dalt.
 an indictment of trespass for any other purpose than to c. 131.
 aggravate the fine, and whether it be necessary in an in- Lamb. b. 4. c.
 dictment of larceny for any other purpose than to shew that 5. f. 496, 497.
 the crime amounts to grand larceny, and to ascertain the 2. Hale 183.
 goods,

(a) Sup. c. 23. goods, thereby the better to entitle the prosecutor to (a) restitution (13).
 55, 56, 57.

(41) The benefit of clergy is taken away by several statutes, provided the larceny amounts to a certain value. It is therefore necessary now to state the value of the things stolen pursuant to the words of the respective statutes.

As to THE FOURTH POINT, viz. In what manner the body of an indictment at common law must set forth the circumstances of time and place, I shall endeavour to shew,

1. How it ought to set forth the circumstance of time ;
2. How that of place.

AND FIRST as to the circumstance of time.

Sett. 76. I find it no where holden, that it is necessary to mention *the hour* in an indictment. But on the contrary, it is said, (b) that if there be any necessity for it in an appeal, which yet is (c) questionable, it is from the *statute of Gloucester*, and not from the common law, and therefore I shall take it for granted, that it is not necessarily required in an indictment ; since it is certain, that there is no statute that makes it so, and the common law seems to have required no greater certainty in an indictment than in an appeal.

(b) S. P. C. 80.
 (c) Sup. c. 23. f. 87.
 1. Bulstrode 203.
 In burglary the hour is usually mentioned, in order to shew that the offence was committed in the night-time ; and in *Rex v. Waddington*, Lancaster Lent Assizes 1771, Mr. Justice Gould held an indictment for burglary insufficient because *the hour* was omitted, 1. Burn. 287.

Sett. 77. But it is laid down as an undoubted principle in all the books (d) that treat of this matter, that no indictment whatsoever can be good without precisely shewing a certain *year* and *day* of the material facts alledged in it. Also it hath been (e) adjudged, that the sheriff's return of a rescous without shewing the year and day is insufficient, because such a return is in lieu of an indictment. Also it is taken for granted in (f) *Dyer*, that an indictment of rescous is not good without expressly shewing the day and year both of the arrest and also of the rescous, and that the time of the latter is not sufficiently shewn by (g)

(d) S. P. C. 95.
 Lamb. b. 4. c. 5.
 Dalton c. 131.
 F. Indist. 28.
 Dyer 164.
 Summary 206.
 2. Hale 177.
 179.
 8. H. 5 8.
 (e) F. Cor. 43.
 F. Attach. 1. B. Return de Brief 97. 3. H. 7. 11. (f) Dyer 164. Vide F. Return de Visc. 32. Dyer 69. 10. Edw. 4. 15. Qu. 5. H. 7. 17, 18. (g) Yet the contrary is adjudged 2. Bulstrode 208. C. Jac. 345.

shew-

showing that of the former. And where an indictment of rescous set forth, that *J. S.* committed such a felony such a day, and year, and place, *per quod A. B. prædictum J. S. cepit et arrestavit, et in salva custodia sua adtunc et ibidem eundem J. S. habuit et custodivit*, it is made *(a)* *quære*, whether the indictment be not insufficient, because no time of the arrest is alledged in the same sentence with it; and it is doubtful whether the time of the custody, which is alledged in the next sentence by force of the copulative, be applied also to the arrest or not, and *Dyer* seems rather to incline to the contrary opinion.

(a) *Dyer* 164.
See also
3. *Peer. Wms.*
484. 497.
4. *Bac. Abr.*
400.

However, it is certain, that if an indictment lay the offence on an *(b)* uncertain or impossible day, as where it lays it on a *(c)* future day, or lays one and the same offence at *(d)* different days, or lays it on such a day, which makes the indictment *(e)* repugnant to itself, it is void. Also it hath been adjudged, that no *(f)* defect of this kind can be helped by the verdict. Also it is said, that an indictment of death laying an assault at a certain time and place, is *(g)* not sufficient without repeating the time and place in the clause of the stroke: and the like rule seems also to hold as to indictments of other felonies, in which respect such indictments differ from indictments of trespasss. Also it is *(b)* certain, that an indictment of death ought as well to set forth the year and day of the death as of the stroke, that it may appear that the party died within the year and day. But these matters having been more fully considered in the chapter of Appeals, I shall refer the reader thither for the better understanding of them.

(b) *Sup. c. 23.*
f. 88.
Moor 555.
Rex v. Fear-
ly, Term Rep.
316.
(c) *Rast.* 263.
(d) 2. *H. 7. 7.*
(e) *Sup. f. 64.*
and *c. 23.*
f. 88, 89.
(f) 1. *R.*
Abr. 781.
(g) *Sup. c. 23.*
f. 88.
Hetley 15.
119, 120.
5. *H. 7. 17.*
13.
1. *Bult.* 203,
204.

(b) *Sup. c. 23. f. 90.*

Sec. 78. It seems to be *(i)* generally agreed, that the words "*adtunc et ibidem*" *(1)* in the subsequent clauses of an indictment, are of the same effect as if the year and day mentioned in the former part of it had been expressly repeated. Also it hath been *(k)* adjudged, that an indictment laying the offence on the *Thursday* after the day of *Pentecost* in such a year is good. And from the like ground it seems to follow, that an indictment laying it on the *(l)* *utis of* *(k)* *7. H. 6.* *Easter*, &c. which shall be taken for the very eighth day after the feast, or on the *tenth of March* *(l)* last (if it may be ascertained by the style of the sessions before which the indictment was taken), is as good as if it had shewn the day and year by expressly naming such a day of such a month, &c.

(1) *Dyer* 28.
2. *Hale* 178.
Keilway 100.
Sup. c. 23.
f. 88.
4. *Coke* 42.
Qu. Dyer
164.
(k) 7. *H. 6.*
39.
R. Error 17.
Plowden 222.
(l) *Lamh.*
b. 4. c. 5.
f. 491.

(1) If omitted, judgment

may be arrested, *Strange* 901.

Sec.

(a) B. 1. c. 20. f. 5. Lamb. b. 4. c. 5: f. 492. *Sect. 79.* And where an indictment charges a man with a bare omission, as the not scouring such a ditch, &c. it is (a) said, that it need not shew any time.

(b) Sup. c. 43. f. 90. 1. Levinz 113. 2. Salkeld 195. (c) Kelyng 11. Burrows 1901. *Sect. 80.* It is most (b) regular to set forth *the year* by shewing the year of the king, yet this may be dispensed with for special reasons, if the very year be otherwise sufficiently expressed, for that only is material. And therefore in the (c) case of *THE REGICIDES* no year of any king was laid for the king's murder, but the compassing of his death was laid in the twenty-fourth year of King *Charles the First*, and the murder was laid on the thirtieth day *ejusdem mensis Januarii*, because if the reign of either king had been expressed, it might have caused a dispute whether that or the other would have been more proper.

(d) Sup. c. 23. f. 87, 88. 91. 3. Inst. 230. 2. Hale 179. *Sect. 81.* It is (d) agreed, that a mistake in not laying an offence on the very same day on which it is afterwards proved upon the trial, is not material upon evidence.

(e) 10. Mod. 336. Vid. sup. f. 74. *Sect. 82.* If an indictment charge a man with having done such a nuisance such a day and year, &c. and on divers other days, it is void (e) only as to the facts on those days which are uncertainly alledged, and effectual for the nuisance on the day specified. But if it charge a man generally with several offences at several times, without laying any one of them on a certain day, (f) as with extorting divers sums of divers subjects for a passage over such a ferry, (g) &c. between such a day and such a day, it hath been adjudged, that it is wholly void (14). Yet it hath been solemnly resolved, that a conviction of (g) deer-stealing, setting forth the offence between the eighth and the twelfth of July, &c. is sufficient.

(14) Because every extortion is a separate and distinct offence, requiring a separate and distinct punishment in proportion to the enormity of it; and if accumulated under a general charge, instead of being singly and certainly laid, it is impossible for the Court to adapt the punishment to the measure of the crime. 4. Mod. 103. Sed vide Cro. Jac. 611. 1. Keble 357.

As to the second particular, *viz.* How an indictment at common law must shew the place where the offence was done.

(b) 25. Edw. 3. 43. F. Indict. 1. Suggestion 7. 4. H. 7. 8. 2. Hale 180. Keilwood 98. 1. Bullst. 124. See the books cited f. 70. B. R. H. 105. (i) Vide Keil. 33. 89. C. Eliz. 448.

which

which the indictment is taken, and must also be alledged in such a manner as is perfectly free from all (a) repugnance and inconsistency. For if one and the same offence be laid at two (b) different places; or "at the town of B. (c) *aforsaid*," where no such town was mentioned before; or if, in an indictment of murder, the stroke be laid at A. and the death at B. and then it is (d) concluded that the defendant *sic felonice murderavit* the person deceased at A, the indictment is void. And so it is also, if it do (e) not lay a place both of the stroke and the death; or if the place or places so alledged be not such from whence a (f) *visne* may come. Yet it hath been adjudged, that a fact laid in a parish of London with some other addition, as in the parish of St. (g) *Michael in Woodstreet, London*, or in the parish of St. (h) *Lawrence Jury*, is good without shewing the ward in which the parish lies (15). But these matters having been more fully treated of in the (i) chapter of Appeals, and also in the foregoing part of this (k) chapter, relating to the certainty of the time of the offence, I shall refer the reader thither, for the fuller consideration of them.

Sup. c. 23. f. 92. (b) 7. H. 6. 36. Vide Rex v. White, Burrow 333. (c) C. 23. f. 88, 89, 91, 92, and 93. (d) Sup. f. 76, 77, 78. (15) If there be two villis in a parish, the indictment need not shew in which of them the defendant lives, Sayer 119. Vide also Burrow 337.

Sec. 84. It seems, that there is no need in an indictment on a statute setting forth the description which brings the defendant within the purview of it, to set forth any place where those things happened which brought him within such description; and therefore where a statute makes it high treason for a person born within the realm, and in popish orders, to come into, or remain in the kingdom, &c. there is no need, in an (l) indictment on such statute, to shew in what place the defendant was born or ordained. Also it seems to be (m) agreed, that a mistake of the place in which an offence is laid, will not be material upon the evidence on "not guilty" pleaded, if the fact be proved at some other place in the same county.

Salkeld 288. Summary 264. Strange 44. 3. P. Will. 439. Andrews 164. Foster 7. 1. Burrow 333.

But if there be no such place in a county as that wherein an offence is laid in an appeal or indictment, all process on such indictment or appeal is made void by the statute of 7. Hen. 5. and 9. Hen. 5. c. 1. and 18. Hen. 6. c. 12. by the last of which statutes it is recited, "That in the parliament holden in the ninth year of *Henry the Fifth* it was ordained, for that many people of malice cause
" often

“ often the king’s liege people to be appealed or indicted in diverse counties of treasons or of felonies, supposing by the said indictments or appeals, that the said treasons or felonies were done in a certain place in such a county, &c. where no such place is in the same county, that the process of the same shall be void; and that the indictors, procurators and conspirators shall be punished by fine, &c. by the discretion of the justices, and also liable to writs of conspiracy: and by the present statute the above-recited statute is made perpetual.”

9. Hen. 5. c. 1.

Sect. 85. It is observable, that the statute made in the ninth year of *Henry the Fifth*, herein referred to, seems to be wholly omitted by *Keble* and *Pulton*, who have no other statute concerning this matter made in the ninth year of *Henry the Fifth* excepting the first, which only confirms a statute made in the seventh year of the same king concerning appeals and indictments; and there is no other statute whatsoever in the seventh (a) year of that king mentioned in *Keble* or *Pulton*, but only one which requires the justices before the award of any *exigent* to inquire by inquest of office, whether there be any such place in the county as that wherein an offence is laid in an appeal or indictment. But this statute seems only to extend to the county of *Lancaster*, for it is directed to the chancellor of that county, and recites, “ that persons had been indicted and appealed in places falsely alledged in the said county,” and in the enacting part speaks only of “ justices who had power to determine felonies in the said county,” and in the latter expressly commands the said chancellor to “ cause it to be proclaimed in the same county,” but mentions no other. From all which I see not how it can extend to any other county; and yet *Wingate* in his (b) Abridgment makes it equally extend to all counties. However, (c) *Rastal* in his collection of statutes seems to have set down the very statute which is referred to by the above recited statute of 18. Hen. 6. c. 12. and this is certainly (d) still in force.

(a) Qu. vide 9. Hen. 5. c. 2. Ruff head’s Statutes.

(b) Wingate’s Abridgment of the Statutes under the title of Conspiracy, f. 3.

(c) Rast. Statutes, Conspiracy 3. so also Ruff head Stat. p. 512.

(d) Lamb. b. 4. c. 5. f. 493. F. N. B. 115.

All law proceedings are now to be in the English tongue. Vide *infra* f. 88.

As to THE FIFTH POINT, viz. Where the body of an indictment may be vitiated by false or improper *Latin*, or the use of *English* instead of *Latin*, I shall endeavour to shew,

1. Where false *Latin* will vitiate an indictment.
2. Where a word which is not *Latin*.
3. Where such faults are holpen by an *Anglicè*.

As

As to the first of these particulars, viz. Where false *Latin* will vitiate an indictment.

SECT. 86. It seems to be holden generally in some (a) books, that no false *Latin* will vitiate an indictment. And it seems to be holden by my Lord (b) *Coke*, that an indictment shall not be quashed for any false concord between the substantive and the adjective, as *præfatus regi*, or *præfata reginæ*, because though the expressions be incongruous, yet they are *Latin* and significant. Neither do I find this opinion denied by any other authority, and therefore I leave it to be considered; whether it may not still be maintained, especially (c) considering that the sense appears as fully, clearly, and expressly from such *Latin* as if it had been never so properly expressed. And it seems also, that the like reason may be given for the case in (d) *Tilverton*, wherein an indictment of forcible entry, finding that the defendant *unum messuagium ingressum fecit*, without adding the word *in* before *messuagium*, was adjudged good; but it is said in the book, that this is not false, though it be not fine *Latin*; by which it seems to be implied, that if it had been false *Latin*, it might have vitiated the indictment.

However, it seems to be settled at this day, that an indictment against two or more, laying the fact charged against them in the singular number, is insufficient; as where it finds, that *A. and B. insultum (e) fecit*; the reason whereof perhaps may be this, that it appears somewhat doubtful upon the face of the indictment whether the jurors intended to charge more than one, because the fact is laid in the singular number, which it seems absurd to apply to more than one, and therefore the indictment is insufficient for its uncertainty. As to (f) *Fulwood's Case*, wherein *Croke* reports the contrary to have been resolved, it is certain, that the verb in the record is in the plural number. And as to the (g) cases wherein faults of this kind have been amended in original writs, as *teneat conventionem for teneant*, and such like. it may be answered, that those emendations were made by virtue of the statutes of (h) Amendments, which extend not to criminal proceedings. And as to the case in (i) *Bulstrode's Reports*, wherein it is said to have been resolved, that an indictment of felony against more than one in the singular number was amended, and thereupon the defendants were adjudged to be hanged, it may be answered, that it doth not appear in what part of the indictment the singular number was put for the plural; neither is the said resolution, in whatsoever sense it be taken, reconcilable with the later authorities, as shall be more fully shewn under the twelfth point.

(*c*) 2. Keb. 51. But it is said (*a*), that a fault of this kind is made good
 (*b*) C. Car. by the grand jury's finding the indictment *billa vera* against
 464, 465. one of the defendants only, the reason whereof perhaps may
 See also Rex be this, that the uncertainty of the indictment is supplied
 v. Fieldhouse, by such an indorsement. But this seems contrary to the au-
 Cowper 325. thorities, relating to this matter, cited in the second section.
 where *billa* Also it hath been adjudged (*b*), that where a bill of indict-
vera was in- ment lays the fact in the plural number against two, and it
 dorset as to is found *billa vera* as to one of them only, it is good; and
 one distinct count of an indictment yet the verb in the plural number in the record must, after
 indictment and *ignoramus* such a finding, be applied only to one person: but to this
 as to the rest, it may be answered, that there is no uncertainty either in
 and held good. the bill or the indorsement. Also it hath been adjudged (*c*),
 (*c*) 1. Sid. 219. that the word *solvat* instead of *solvat* is not fatal in a judg-
 2. Hale 169, ment, but that a new one shall be given.
 170.
 3. Stra. 870.
 Bar. K. B. 24.

As to the second particular, *viz.* Where the use of a word which is not *Latin* will vitiate an indictment.

(*d*) C. Eliz. 85. Sect. 87. It seems generally agreed (*d*), that an indict-
 Qu. 3. Keb. ment wholly in English is void. This seems to depend upon
 637. the statute of 36. Edw. 3. c. 15. by which it is enacted,
 "That all pleas which be pleaded in any of the king's courts
 "shall be entered and enrolled in *Latin*." And from hence
 it seems clearly to follow, that if any material part either of
 the body or caption of an indictment be expressed in a word
 which is not *Latin*, as by the word (*e*) *erectaverunt*, instead of
 (*e*) .Eliz. 211. *erexerunt*, or (*f*) *brachia sua dextra*, instead of *brachio*, or (*g*)
 Hutt. 56. Sed *præsentant. existit* instead of *præsentat*. the indictment is in-
 vide Cowper 229. sufficient (except in some special cases herein after set forth);
 (*f*) C. Eliz. for no one can say, that the bare giving a *Latin* termination
 137. to a word unknown in that language, can make it become
 (*g*) 1. Sid. 175. *Latin*; and if the want of one material word may be supplied,
 Salkeld 370. why not the want of two, and so on? It hath indeed been
 Sed vide 2. helden, that a fault of this kind, as "*imaginavit*" for
 Salk. 660. "*imaginatus est*," "*avæ*" for "*avie*," is amendable in an
 Doug. 194. original writ, which yet is denied by others, if it be in a
 (*h*) 8. Co. 159. (*i*) substantial part. However, it seems certain, that such
 2. Bulst. 35. amendment must depend upon the statutes of Amendments,
 Moor 5. which extend (*k*) not to criminal proceedings.
 N. Bend. 33.
 1. And. 24.
 (*i*) 1. Lev. 1, 2.
 5. Coke 45.
 C. Eliz. 462. (*k*) 1. Salk. 51, 52. 6 Mod. 263. Vide sup. sect. 86.

Also it seems, that it is no less a fault to make use of a word which is proper *Latin* in another sense, whether entirely

(*l*) 1. Bulst. 109. different, or of a much larger extent, than that in which it
 (*m*) Noy 85. is used, as of the word (*l*) *collis* for *colli*, or (*m*) *mala ars* for
 1. Jones 144. *veneficium*. Also it seems agreed, that an abbreviation not
 Latch 156. justified by legal usage, as (*n*) *ano*. without a dash for *do-*
 (*n*) 5. Sid. 175. *mine*

mino (a), *R. Rs.* for *regni regis*; or the expression of a number of figures that are not (b) Roman, is equally fatal as it would have been wholly to have omitted what you endeavour in such manner to express. Also it hath been (c) adjudged, that an inquisition finding that *J. S. seipsū emerfit*, &c. is insufficient; because *emerge* doth not signify to put into, but to rise out of the water. (d) Also it is said, that an indictment has been quashed for the words *pax regia* instead of *pax regis*; but it appears not what was the nature of the indictment, nor in what part of it these words are used, and therefore I would suppose it to have been in such part of some indictment wherein those expressions are so material that they cannot be rejected as surplus and immaterial; for it seems to be a settled rule, that nothing which may be so rejected shall vitiate an indictment; as where the year of the Lord is written in common (e) figures, but the year of the king is well expressed; or where an indictment is said to be taken before *J. S.* and *J. N.* (f) *duo iusticiariis*, &c. Also it seems, that the use of a word which is not proper *Latin*, as (g) *contrafacere* for counterfeiting, may be made good by precedents. And there can be no doubt but that (h) terms of art, which are necessary in all indictments, as *felonia*, *murdrum*, *burglaria*, and such like, are good, though they be not good classical *Latin*; for they are of such a complex and peculiar signification as no proper *Latin word* will come up to. Also it hath been (i) adjudged, that a literal translation of a statute into *Latin* is sufficient, if intelligible, let it be never so inelegant; as where it sets forth that the defendant *super caput suum proprium* did forge, meaning that he did it of his own head.

The word *inducari* instead of *indictari*, and *destructionem* instead of *destructionem*, have been thought fatal. *Parker's Case*; *Hutton*, 55. So also *austrelia*, as a description of the South Sea Company, instead of *australia*, has been adjudged fatal, *Strange* 787. *Ld. Raym.* 1515. But in the case of the King v. Beach, *LORD MANSFIELD* said, that the Court had looked into all the cases upon the subject, and that the true distinction is; even in the case of a variance, that where the omission or addition of a letter does not change the word, so as to make it another word, it is not material, *Cowp.* 430. *Douglas* 194. Vide also note page 616. feet. 36. Vide post. 352.

As to the third particular, *viz.* What faults of this kind are holpen by an *Anglicè*.

Sec. 88. It seems to be holden generally in some books, 2. *Hale* 169. that the use of a word which is either not *Latin* at all, or not *Latin* in the sense in which it is used, may, in many cases, be holpen by an *Anglicè*, as (k) *erectaverunt*, *Anglicè* did erect; (l) *Cro. Eliz.* 231. (l) *retes*, *Anglicè* nets; (m) *pellices*, *Anglicè* skins; *ollis*, (n) *æriis*, *Anglicè* brass pots. But to this it may be answered, that as to the three first of these instances, what is said concerning them seems contrary. (m) 1. *Sid.* 318. (n) *Cro. Jac.* 129.

this matter is only spoken of by the bye, and did not come into judgment: and as to the last of them it may be said, that it doth not concern a criminal proceeding, but a civil action, and that after a verdict; and if the purport of it be, that an *Anglicè* helps the use of a word that is not *Latin* in an action of trover, though damage be expressly given for it, it is contradicted by many other express (a) resolutions, in which it seems to have been taken as a settled rule, that where damages are expressly given for a thing expressed by a word that is not *Latin*, it is no way helped by an *Anglicè*. Also it hath been (b) adjudged, that an indictment for taking *essō discas*, *Anglicè* dishes, is insufficient; and this is agreeable to what is laid down as a settled rule in many (c) books, viz. That where there is a proper *Latin* word for the thing intended to be expressed, no *Anglicè* will help an improper one, as it will do where there is (d) no proper *Latin* word, because, in such a case, there is such a necessity either to use a feigned one or none at all. Also it hath been adjudged, that where there is a proper *Latin* word, an *Anglicè* cannot make good use of any other either in a more (e) special or (f) extensive signification than the *Latin* language will bear, as to make the words (g) "*malas artes*" signify witchcraft, or (h) "*riscus*" a box full of linen, or (i) "*fulcrum*" "*tebli*" a field bed with a tester and curtains; in which case the Judges will take (k) no manner of notice of what comes under the *Anglicè* beyond the strict signification of the *Latin*.

(a) 1. Lev. 99.
129. 204.
1. Sid. 93.
318.
Raymond 5.
9. Lev. 336.
10. Co. 130.
333.
(b) Keble 779.
(c) Noy 85.
Litch. 156.
March 16. 60.
1. Jones 144.
10. Coke 133.
Vide 1. Lev.
204.
1. Sid. 318.
Yelv. 68.
(d) Co. 131.
Noy 85.
Litch. 156.
March 16.
1. Sid. 81.
1. Jones 144.
(e) Noy 85.
1. Sid. 60. 81.
(f) Cro. Jac. 654, 665. 2. Roll. 254, 255. 10. Coke 130. 132, 133. (g) Cro. Jac. 665, 664.

Vide observations upon these statutes, 3. Com. 322. Barnardiston, K.B. 177. 261. 268. 298. 271. 234. 336.

+ But it is recited by 4. Geo. 2. c. 26. that many and great mischiefs do frequently happen to the subjects of this kingdom from the proceedings in courts of justice being in an *unknown* language, &c. &c. and it is therefore enacted, "That all proceedings whatsoever in any courts of justice in *England*, and in the court of exchequer in *Scotland*, and by 6. Geo. 2. c. 14. s. 5. in *Wales* and, *Berwick upon Tweed*, which concern the law and administration of justice, shall be in the *English* tongue and language only, and not in *Latin* or *French*, or any other tongue or language whatsoever, and shall be written in such a common legible hand and character as the acts of parliament are usually ingrossed in, &c. and in words at length, and not abbreviated, and all persons offending against this act shall forfeit fifty pounds to any person who shall sue for the same.

"But by 6. Geo. 2. c. 14. s. 5. Law proceedings may be written or printed in the like way of expressing numbers
"by

“ by figures, as have been commonly used, and with such
 “ abbreviations as are now commonly used in the English
 “ language. Nor shall the penalty aforesaid be extended to
 “ the expressing the proper or known names of writs or
 “ other process or technical words in the same language as
 “ hath been commonly used. Nor shall this act extend to
 “ the certifying proceedings in the court of admiralty ; nor
 “ by 6. Geo. 2. c. 6. to the court of receipt of exchequer in
 “ Scotland.”

As to THE SIXTH POINT, viz. Where the offence indicted may be laid jointly, and where severally ; and where both jointly and severally ; and where the offences of several persons may be laid in one indictment.

Sec. 7. 89. It seems certain at this day, that notwithstanding the offence of several persons cannot but in all cases be several, because the offence of one man cannot be the offence of another, but every one must answer severally for his own crime, yet if it wholly arise from any such joint act which in itself is criminal, without any regard to any particular personal default of the defendant, as the joint (*a*) keeping of a gaming-house, or the (*b*) unlawful hunting and carrying away of a deer, or (*c*) maintenance, or (*d*) extortion, &c. the indictment or information may either charge the defendants jointly and severally ; as thus, “ *quod (e) custodiverunt, et uterq. eorum custodivit ;*” or “ *quod (f) asportaverunt, et eorum uterq. asportavit ;*” or may charge them jointly only, without charging them (*g*) severally, because it sufficiently appears, from the construction of law, that if they joined in such act, they could but be each of them guilty ; and from hence it follows, that on such indictment or information (*h*) some of the defendants may be acquitted, and others convicted ; for the law looks on the charge as several against each, though the words of it purport only a joint charge against all.

(*a*) Rex v. Dixon & ux. adj. Trin. 2. Geo. 1. 10 Mod. 335. 2. Hale 174.
 (*b*) Rex v. Hawkins, adj. M. 3. Geo. 1. 302.
 (*c*) 1. Vent. 382.
 (*d*) Salke'd 182.
 (*e*) Rex v. Dixon & ux. adj. Tr. 2. Geo. 1. 10. Mod. 335.
 (*f*) Rex v. Hawkins, adj. M. 3. Geo. 1. 302. Rex v. Williams, adj. M. 10. Annæ. Ric v. White, 4. Will. 3. C. Car. 380, 381. 2. R. Abr. 707. 48. 708. Con. 3. Roll. 345. Palm. 367, 368. (*h*) 2. R. Abr. 707. 48. 708. Bear v. White, 4. Will. 3. 10. Mod. 63. Foster 329.

But where the offence indicted doth not wholly arise from the joint act of all the defendants, but from such act joined with some personal and particular defect or omission of each defendant, without which it would be no offence, as the following a joint trade without having served a seven years apprenticeship required by the statute, in which case it must be the particular defect of each trader which must make him guilty, and one of them may offend against the statute, and

(a) 1. R. Ab. the others not, the indictment or information (a) must charge them severally and not jointly; for it is absurd to charge them jointly, because the offence of each defendant arises from a defect peculiar to himself. And for the like reason a joint indictment against several, for not (b) repairing the street before their houses, hath been quashed (15).
 1. Mod. 280.
 2. Hale 174.
 Confirmed
 Stra. 623.
 1. Sess. Caf. 221.
 4. Burr. 2046. Barnard. K. B. 36. See also Burr. 980. Ld. Raym. 1572. But this last case is said not to be law. (b) 2. R. Abr. Burr. 984. 81.

(15) Several defendants cannot be joined in one indictment for perjury; for perjury is a separate act in each; and one may be desirous to have a *certiorari*, and the other not; and the jury on the trial of all may apply evidence to all that is but evidence against one, Strange 921. So also in *Rex v. Clendon*, and others, where two were joined in the same indictment for an assault, the Court held they were distinct offences, Strange 870. Ld. Raymond 1572. Bar. K. B. 337. 2. Sess. Caf. 24. But in the case *Rex v. Benfield and Saunders*, E. 33. Geo. 2. on an information against both for the same libel, it was held good; and the case of the *King v. Clendon*, held not to be law, Burrow 980. And where goods are obtained under false pretences, if the false pretence is conveyed by words spoken by one defendant in the presence of others, who are acting in concert together, they may be all indicted jointly, *Rex v. Young* and others, 3. Term Rep. 98.

But I do not find it settled in what cases several offences of several persons may be joined in one indictment; for in some (c) books indictments against several for several offences, as for a recusancy, (d) following a trade without having served an apprenticeship, not (e) repairing the streets, &c. are mentioned without any exception on this account. And it is holden, that one indictment against two justices for not (f) inquiring of a riot, and an indictment against two persons for speaking of the same (g) words, may be maintained; and yet it is (h) agreed, that one action lies not against several for the same words. Also in (i) *Roll's Reports* an indictment against several for having inmates in their houses is said to have been quashed because it was but one joint indictment against them all, whereas there ought to have been several indictments against them. Also in the *sixth* (j) *Modern Reports*, an indictment against several for the neglect of a day of fasting appointed by proclamation, is said to have been quashed for the like reason. And this is certainly the most agreeable to the rule of bringing actions upon penal statutes, wherein several offences shall not be joined, except it be in respect of some one thing to which all of them have a relation; as where several (l) join in a suit in the (m) admiralty for a contract on land, or in procuring or giving an untrue verdict, or are privy to one another (n) in maintenance of the same cause.
 (c) 1. Leon. 241.
 (d) 2. R. Abr. 81.
 Salkeld 382.
 2. Burr. 984.
 1. Vent. 302.
 (e) 2. R. Abr. 81.
 (f) Style 245.
 (g) Style 312.
 (h) C. 13c. 647.
 1. R. Abr. 781.
 Palmer 313.
 1. Bullst. 15.
 2. Burr. 684.
 (i) 2. Roll. 164.
 (j) 6 Mod. 210.
 Strange 623.
 270. 921.
 1. Ld. Raym. 1572.
 2. Sess. Caf. 23. 154.
 1. Bar. K. B. 30. 337.
 See vide Burr. 985.
 (l) B. Join. in Action, 5. 47. 100. 108. F. N. B. 171. F. Dec. tant. 1. 4. 6. 8. 9. (m) Qu. Dyer 359. (n) B. Maint. 26. 32.

As to THE SEVENTH POINT, *viz.* Whether the words *vi et armis* be in any case necessary in the body of an indictment at common law.

Sec. 90. It is taken for granted in some (a) books, that (a) C. Jao. they were necessary at common law in all indictments for ^{473.} offences which amount to an actual disturbance of the peace, ^{Skinner 426.} as rescoues, and assaults, and such like; yet I do (b) not ^{2. Hale 187.} find it agreed, that they were ever necessary in such indict- ^{2. Lev. 221.} ments wherein it would seem absurd to put them in, as in ^{See the books cited in the next sect. qu. sup. c. 23.} indictments for (c) conspiracies, (d) cheats, flanders, es- ^{sect. 85.} capes, and such like, or (e) nuisances committed in a man's own ground. ^{(b) Yet see}

8. 8. (c) 1. Lev. 125. 126. Dalton c. 131. (d) 1. Keb. 562. ^{prea. 37. H.} (e) Popham 206. Cro. Ca. 377. ^{Dalt. c. 131.}

However, there can be no doubt but that the omission of them in indictments of this kind, is made good by the statute of 37. Hen. 8. c. 8. by which it is recited, “ That in all “ indictments of felony and trespass, and divers others, it “ was common to use the words *vi et armis*, and in divers of “ them to declare the manner of the force and arms, that is “ to say, *vi et armis, with auctoritate, baculis, cultellis, arcubus et sagittis*, or other such like words, where in truth the parties indicted had no such weapons at the time of the offence, yet for lack of such words the said indictments were taken a-void, and had been avoided by writ of error or plea, &c.” and thereupon it is enacted, “ that these “ words *vi et armis, videlicet, cum baculis, cultellis, arcubus et sagittis*, or other such like, shall not of necessity be put “ in any indictment or inquisition; nor shall the parties “ indicted have any advantage by writ of error or plea or “ otherwise, to avoid any such indictment or inquisition for “ the want of these or the like words; but that the same “ inquisitions and indictments, and every of them, lacking “ the said words, or any of them, shall be adjudged as effectual to all intents, constructions, and purposes, as the “ same inquisitions and indictments having the same words “ in them.”

Sec. 91. But notwithstanding this statute seems to be so express as to all indictments, yet it is (f) holden in many (f) S. P. C. books, that indictments of trespass, and such like, are still ^{94.} insufficient without the words *vi et armis* (16); and many ^{2. Lev. 221.} ^{1. Sid. 140.} 1. Buft. 205. 1. Levinz 126. 1. Keble 101. 2. Keble 154. Vide Popham 106. C. Ca. 377, 378.

(16) In an indictment for a riot the words *vi et armis* are implied in the words *motus cessant, fregerunt, et prostraverunt*. Strange 834. Bar. K. B. 138. 2. Sess. Cal. 13. Cro. Car. 345. 4; 2. Styles 12. 3. Peer Will. 464.

indictments have accordingly been quashed for want of them, where they are not implied in some others, as (a) *rescussit*, or (b) *manu forti*, &c. But it seems difficult to assign any reason for these opinions, unless it be, that because the enacting part of the statute says, that the words "*vi et armis*, "*videlicet, cum baculis, cultellis, &c.*" are not necessary, &c. the meaning was only to take away the necessity of those superfluous words *baculis et cultellis*, &c. but not of the words *vi et armis*, where they are proper and pertinent. But to this it may be answered, that the preamble seems to complain of the opinion that the words *vi et armis*, whether put by themselves, or used with those other words, were in any case thought necessary in indictments; and it is most natural so to explain the enacting part of a statute as to make it extend to all the mischiefs complained of in the preamble; besides, the enacting part of the statute is express, "that indictments without these words, *vi et armis, videlicet, baculis, cultellis, arcubus et sagittis*, or any of them, shall be as effectual as if they had been comprised in them;" and surely the words *vi et armis* cannot but be comprehended under these words, "or any of them."

(c) *Rex v. Marriott*, 2 Lev. 221. See 1st. It is said (c) indeed in *Levinz's Second Reports*, that the words *vi et armis* are still necessary, because without them there can be no *capiatur* entered, nor fine to the king; but this is in effect to contradict the statute, which says, "that an indictment without those words shall be as effectual to all intents, constructions, and purposes, as an indictment with them." Besides, will any one say, that there can be no *capiatur* nor fine to the king upon indictments of cheats, conspiracies, and such like? wherein yet it seems to be agreed, that those words are not necessary. And agreeably hereto, the court of king's bench has (d) often refused to quash indictments of trespass for want of those words. However, it is certainly safe and advisable to make use of them where they are proper and pertinent, if it be to no other purpose than to aggravate the offence (e).

(d) *C. Jac.* 172, 473. *Vide C. Jac.* 345. 2. *Bull.* 208. *Dalt. c. 131.* *Lamb. B. 4.* 5. *c. f.* 502, 503. (e) See Lord Hardwicke's opinion upon this subject, in the case of *Rex v. Burridge*, 3. *Peer Wins.* 458.

AS TO THE EIGHTH POINT, *viz.* Whether it be necessary in the body of an indictment at common law to lay the offence *contra pacem*.

Sec. 92. Inasmuch as all offences whatsoever which are subject to a public prosecution seem in general to be so, as they are breaches of the law, and in that respect tend to the disturbance of the quiet and peaceable government of the king

king over his people, it seems to be a good general (a) rule, (a) 3. Keble that no indictment or information for an offence, capital 490. or not capital, against the common law or statute, can be 1. Keb. 490. good, except it expressly suppose such offence to have been 2. Bullstrode 258. done against the peace of the king or kings in whole reign 2. Hale 186. (17) or reigns it was committed. See the cases cited in the

following part of this section, and Cro. Eliz. 186.

(17) Confirmed by all the Judges in Rex v. Lookup, Burr. 1901.

And accordingly I find, that every precedent of an indictment in *Coke's Entries*, whether for (b) treason, or (c) felony, or (d) inferior offences, expressly lays the offence against the peace of the king, except only in four instances: THE FIRST whereof is of an indictment for a (e) nuisance for not repairing the highway, which if it may be maintained, seems to depend chiefly on this reason, that the offence is of such a nature that a man may be as well guilty of it in his own ground as in that of another, and therefore it hath been (f) holden, that it needs not be laid *against the peace*, because the laying it in such manner may seem to imply somewhat of force or trespass against the person or possession of another: but it seems difficult to reconcile this opinion with those many resolutions taken notice of in the following part of this section, by which indictments, for want of these words *contra pacem*, have been adjudged insufficient, where the offences could on no other account be said to be *against the peace* than as they were breaches of the law, as all nuisances certainly are. THE (g) SECOND of the said instances in *Coke's Entries* is, of an indictment of homicide by misadventure, and THE THIRD (h), of an indictment of homicide in self defence, but these precedents, if they may be maintained, seem to depend chiefly on this reason, that such offences are supposed to be owing rather to the misfortune than the fault of the party. And THE (i) FOURTH of the said instances is, of an indictment of perjury on the statute which concludes *in contemptum reginae, &c. et contra formam statuti*, without adding *contra pacem*. But (k) *Rastal's Precedents*, both of indictments of felony and of inferior offences, do as often omit the words *contra pacem*, as make use of them. However, certainly the much greater number of precedents expressly conclude *contra pacem*; and the authority of these is much strengthened by those many cases in the Reports wherein indictments and informations appear to have been quashed for want of the words *contra pacem*; as indictments and informations for (l) barratry, (m) forgery, (n) retaining a servant without a testimonial from his last master, (o) following a trade without having served an apprenticeship, (p) erecting a cottage, (q) assault and battery, &c.

But *Yelverton* 66.

- (a) *Rastal* 409. But it seems clear from all the precedents, that neither an information (a) *qui tunc* on a penal statute, nor an information by the king for an (b) intrusion, or other (c) wrong of a civil nature done to his lands, goods, or revenues, need the words *contra pacem*.
 390.
 (c) *Rastal* 410. Co. Ent. 390.

- Sett.* 93. If the offence indicted be expressly laid, partly in the reign of one king, and partly in the reign of another, as where *J. S.* is indicted for having erected a weir in the time of *queen Elizabeth*, and continued it in the time of *king James*, and thereupon the indictors conclude, that so the weir was erected and continued *contra pacem regis*, &c. without adding *contra pacem nuper reginæ*, the indictment is (d) insufficient; because it appears, that the commencement of the wrong, which is as much indicted as the continuance, was in the reign of *queen Elizabeth*, and consequently, if a crime, must have been against the peace of her reign. But if the indictors had concluded only, that *J. S.* so continued the weir *contra pacem domini regis*, &c. and had laid the erection of it by way of recital or inducement only, it is (e) said, that the indictment had been good, because it should be taken as an indictment for the continuance only.
- (d) *Yelver.* 66. *Vide* 4. H. 6. 4.
 2. *Hale* 188, 189.
 F. Brief, 25.
 (e) *Yelv.* 65.
 4. H. 6. 4.
 F. Brief 25.

As to THE NINTH POINT, *viz.* Whether it be necessary in the body of an indictment at common law to lay the offence *contra coronam et dignitatem regis*.

- (f) *Rastal* 263.
 (g) 2. *Bull.* 258.
Aleyn 49, 50.
 (h) 2. R. Abr. 82.
 2. *Hale* 188.
 N. B. Most of the precedents in *Tremain's* Ent. agree with the precedents in *Coke*.
Sett. 94. It is observable, that all the precedents of indictments in *Coke's Entries* cited in the ninety-fourth section, which lay the offence *contra pacem*, lay it also *contra coronam et dignitatem*, &c. Yet not one of (f) *Rastal's* Precedents doth so. Neither do I find any one case wherein an indictment against which no other exception could be taken, has been adjudged (g) insufficient for the want of these words. But, on the contrary, I find it expressly resolved in (h) *Holbrook's Case*, that an indictment of a riot is good without them.

As to THE TENTH POINT, *viz.* Whether it be necessary in the body of an indictment at common law to lay the offence *in contemptum regis*.

- (i) Co. Ent. 353, 363.
Rastal 267.
 (k) Co. Ent. 362.
Rastal 263.
 (l) Co. Ent. 374, 376, 379, 381, 385, 387.
Sett. 95. It is so laid in some indictments of inferior crimes in (i) *Coke* and *Rastal*, and in others (k) not. Also it is so laid, with the addition of the clause *contra leges suas*, in every information of intrusion upon the king's lands in (l) *Coke* and (m) *Rastal*, and also in an information in (n)
 1. *Coke* 16. 26. (m) *Rastal* 412. (n) Co. Ent. 390.
Coke

Coke for a trover and conversion of the king's goods. But in (a) two informations for mines claimed by the king, which are the only precedents I find of this kind, the supposed injury is laid only *ad damnum regis*, without either of the said clauses. Neither do I find either of them in any indictment of treason or felony, nor in any information *quiam* in *Coke* or *Rastal*. And though it seems to be admitted in the *Year-Book* of (b) the fourth year of *Henry the Sixth*, (b) 4. H. 6. 4. that in an action on a statute it is necessary to conclude, *in F. Brief*, 15. *contemptum domini regis*, yet in (c) *Lutwych's Entries* it is (c) *Lutw.* 132. 133. 134. 135. 139. 165, 167. oftener omitted than used, and no exception appears to have been taken for the omission.

As to THE ELEVENTH POINT, viz. Whether it be necessary in an indictment at common law to lay the offence *illicite*.

Seet. 96. I cannot find this word used in any one of *Coke's* or *Rastal's* *Precedents* of indictments; neither do I find any clear and express (d) authority, that it is in any case (d) See 1. *Keb.* necessary in an indictment at common law; but on the contrary I find it expressly (e) adjudged, that it is not necessary in an indictment of a riot, because the act itself contained in the indictment so plainly appears to be unlawful. But where a statute uses the word *unlawfully* in the description of an offence, it is certain that an indictment grounded on it must use the word *illicite*, or some other tantamount. See *Cox's* *Cases*, *Cases in Crown Law* 65.

As to THE TWELFTH POINT, viz. Whether a defect in any of the particulars abovementioned be amendable.

Seet. 97. I take it to be (f) settled, that no criminal prosecution is within the benefit of any of the *statutes of amendments* (18); from whence it follows, that no amendment can be admitted in any such prosecution but such only as is allowed by the common law. For the use of amendments, vide 3. *Com.* 307. (f) 1. *Jon.* 421.

1. *Salk.* 51, 52. 6. *Mod.* 268, &c. Vide sup. c. 23. *seet.* 129. 1. *Sid.* 66.

(18) Confirmed by *Ld. Mansfield*, *Burr.* 2527. See vide *Douglas* 115. with respect to penal actions, and *Rex v. Holland* 4. *Term Rep.* 457. as to informations *ex officio*.

And agreeably hereto I find it laid down as a (g) principle in some books, that the body of an indictment removed into the king's bench from any inferior court whatsoever, except only those of *London*, can in no case be amended. But it is (b) said, that the body of an indictment from *London* may be amended, because by the City charter a tenor of (g) 1. *Keb.* 252. 2. *Keb.* 580. 1. *Sid.* 155. Vide 1. *Keb.* 45. 2. *Keb.* 141. 142. *Con.*

2. *Bullstrode* 35. (b) 1. *Keb.* 252. 1. *Sid.* 155. 229, 230. Vide *Hob.* 135.

the

(19) The *custum* extends to Middlesex as well as London.

1. Keble 571.
(a) See B. 1. c. 27. sect. 16.

the record only can be removed from thence (19) (a). And it seems, that by the course of the king's bench, a rule may be made on any coroner to amend even the body of his inquest by his notes in a mere matter of form. But I do not find it any where holden, that this can be done after it is filed, by which it becomes a record of the court; and then the same objection seems to lie against the amendment of it, as of an indictment.

(b) 1. Saund. 249.

1. Sid. 175.
2. Keble 656.
3. Mod. 167.

(c) C. Jac. 276, 277.

1. Sid. 155.
(d) 1. Sid. 155.

Rex v. Atkinson, Trin.

25. Geo. 3.
2. Keble 456, 656.

2. Sid. 175.
22. H. 7. 25.

19. Ed. 4. 15.

But it seems to be (b) agreed, that the caption of the indictment from any place may, upon motion, be amended by the clerk of the assizes of the peace, so as to (c) make it agree with the original record at any time during the same Term in which it came in, (d) but not in a subsequent Term. But I have known it holden, that the caption of an inquisition cannot be amended at any time after it is filed, any more than the body; the reason whereof perhaps may be this, that the caption being part of, and drawn at the same time with the inquisition, greater exactness is required in it than in that of an indictment, which is left as a thing of course to be drawn up by the clerk of the court, when occasion shall require.

(e) 1. R. Abr. 196.

2. Jones 420.
(f) Salkeld 51, 52.

6. Mod. 268.
B. Amend. 10.

17. 66. 92.
F. Amend. 59.

20. 32. Dif. de Process, 47. (g) 21. H. 7. 40. F. Amend. 78. See the case of Rex v. Tutchin, 6. Mod. 268. 2 Ld. Ray. 1061. 5. St. Tri. 532.

Also by the opinion of two Judges against that of two, the want of *continuances* in the record of an attainer of felony (e) cannot be amended by the certificate of the clerk of the assizes, especially if the king signify his pleasure that he doth not desire any amendment. And it seems to be (f) settled at this day, that no *discontinuance* is amendable in any criminal prosecution, (g) without consent.

(b) C. Jac. 502.
529, 539.

2. Roll. 59.

(i) Keble 900, 901.

1. Sid. 244.
Vide 8. Coke 156.

3. Lev. 430.

(k) 1. Salk. 47.

(ac) Vide Rex v. Wilkes, Burrow 2127.

21-78. where the doctrine of amendments underwent a very critical investigation.

(h) Salkeld 47. Salkeld 50. Vide 1. Keble 452. C. Car. 144. 1. Levinz 189. 3. Levinz 430. 2. Burrow 758.

But it hath been (b) adjudged, that a mere misprision in the joining of an issue in a criminal prosecution, as where the word *similiter* is omitted, may be amended at any time. Also it hath been (i) adjudged, that the direction of a *venire vicecomitibus* of such a place, which is returned by *J. S. vicecomite*, may be amended on the oath of *J. S.* that there is but one sheriff of the place, which is himself. Also it is every day's practice to amend (k) criminal informations (20) and the pleadings thereon by the rule of court, while all is in paper. And (l) *quære* if the record may not be so amended by the Paper-book at any time before judgment.

Sec. 98. It seems to have been anciently the common practice, where an indictment appeared to be insufficient, either for its uncertainty, or the want of proper legal words, not to put the defendant to answer it; but if it were found in the same county in which the Court sat, to award process against the grand jury, to come into court and (a) amend it. And it seems to be the common practice at (b) this day, while the grand jury who found a bill is before the Court, to amend it by their consent in a matter of form, as the name or addition of the party, &c. (a) 12. Affize 73. 2. Ed. 3. 12. 8. H. 3. 8. S. P. C. 27. F. Indict. 4. 3. 27. 25. E. 3. 43. B. Indict. 2. N. B. They consent at the time they are sworn, that that court shall alter matter of form, altering no matter of substance.

AND NOW I AM IN THE SECOND PLACE to shew what ought to be the form of the body of an indictment upon a statute.

Sec. 99. For the better understanding whereof, having premised, that the same rules which have been already laid down concerning indictments at common law, are generally applicable to indictments on statutes. I shall in this place consider such matters only as more peculiarly belong to the form of the body of an indictment upon a statute, under the following particulars:

1. Whether it be necessary that such indictment recite the statute whereon it is grounded.

2. What mis-recitals of such statutes are fatal.

3. How far it is necessary to bring the offence indicted within the very words of the statute.

4. Whether an indictment grounded on a statute, which will not maintain it, may be made good, as an indictment at common law.

5. How far it is necessary to conclude *contra formam statuti*.

AS TO THE FIRST POINT, viz. Whether it be necessary that such indictment recite the statute whereon it is grounded.

Sec. 100. I take it to be (c) settled, that there is no necessity in any indictment or information on a (d) public statute, to recite such statute, whether the offence be such (c) 5. H. 7. 27. F. Aft. sur le Stat. 7. 20. 2. R. Abr. 76. Plowden 1. 79. &c. 1. H. 6. 1. 4. Co. 48. C. Eliz. 236. C. Car. 229. Dyer 155. 246. B. Aft. sur le Stat. 4. Parl. 15. but C. Eliz. 187. 47. E. 3. 10. Dyer 159. B. Parl. 75. B. Champ. 1. Shower 337. F. N. B. 55. cont. Qu. 6. Modern 148, 141. (d) Moor 468. 699. 4. Co. 13. 76. B. Avow. 5. B. Parl. 15. 32. 2. Hale 172. 192.

only

(a) Dyer 155.
346.
5. H. 7. 17.
6. Mod. 140.
Cro. Eliz. 187.

only because prohibited, or be an evil in its own nature, and whether it be prohibited by more than one statute, or by one only. For the Judges are bound *ex officio* to take notice of all public statutes (a); and where there are more than one by which an indictment or information may be maintained, they will go upon that which is most for the king's advantage.

As to THE SECOND POINT, *viz.* What mis-recitals of such statutes are fatal, I shall endeavour to shew:—

1. Whether all mis-recitals of the substantial part of the statute are fatal.

2. What mis-recitals of the place or time at which the parliament was holden.

3. Whether a mis-recital of the title of a statute.

4. What other mis-recitals are fatal.

As to the first of these particulars, *viz.* Whether all mis-recitals of the substantial part of the statute are fatal.

(b) Plow. 79.
83, 84.

Cro. Eliz. 236.
245.

Palmer 565.

4. Coke 48.

See the three
next sections.

1. Roll. 50.

C. Car. 135,
136.

2. Hale 172.

1. Jones 194.

(11) Vid. 2.

Hale 173.

(c) C. Eliz. 93.

2. Bull. 258.

(d) 4. Co. 12,

13.

C. Car. 135.

(e) 2. Jon. 49,

50.

3. Keble 661.

(f) C. Eliz.

236.

(g) C. Jac. 362.

See sect. 108.

Sect. 101. It seems to be settled, that notwithstanding there be no necessity to recite a public statute, yet if the prosecutor take upon him to do it, (b) and materially vary from a substantial part of the purview of the statute, and conclude *contra formam statuti prædicti*, he vitiates the indictment (21); because it judicially appears to the Court, that there is no such foundation for the prosecution, as that whereon it is expressly grounded; as where in an (c) indictment with such a conclusion, on the statutes which prohibit entries with strong hand, the word *vi* is put for *manu forti*; or where the word (d) *nuncio* is put for *mendacia* in such an indictment on the statutes against the tellers of lies of great men; (e) or where the verb in a statute which expresses the principal act wherein the offence consists, is expressed in such an indictment on such a statute by a word which is neither classical nor legal *Latin*; (f) or where a statute in describing courts wherein it prohibits persons to bring actions in other names without their privity, calls them courts wherein pleas are holden in actions personal, &c. and you, in reciting it in such an indictment, (g) call them courts wherein pleas are holden in any actions.

Sect. 102. Yet it seems that the following mis-recitals of the substantial part of the purview of a statute in any indictment are not fatal; as the omission of a synonymous word, having no other meaning than what is fully expressed in

in the words which are recited; or the joining of words which are either wholly synonymous, or much of the same sense, as signifying such things as generally include one another, as (a) the words *malitiosè et contemptuosè*, &c. with a (a) 2. Bull. 47. copulative, where the statutes use a disjunctive; or the 47, 50, 51, 52, using the singular number for the plural, or the plural for the singular, where the sense is the same; as where in (b) reciting a statute speaking of suits in any courts, you use the words *in aliquâ curiâ*; or where in reciting the statute against disturbing persons in their open preaching, you use the words *in apertis prædicationibus*. (b) C. Car. 522, 523. (c) 2. Bull. 47. &c.

Sec. 103. Also it (d) seems, that no advantage can be taken of a variance from any part of a private statute, without shewing it to the Court in a proper manner, because otherwise such a statute shall be taken to be as it is recited. (d) 1. Coke 3. 1. Sid. 356.

As to the second of the particulars abovementioned, *viz.* What mis-recitals of the place or time at which the parliament was holden, are fatal.

Sec. 104. It (e) seems to be generally agreed, that a mis-recital of the place or the day at which the parliament was holden, vitiates an indictment. As (f) if a parliament was first holden on the twenty-eighth of April in the thirty-second year of Henry the Eighth, and afterwards holden by prorogation on the twelfth of April the next year, and a statute then made be recited, as made at a parliament holden on the twenty-eighth of April in the thirty-second year of Henry the Eighth: Or if a parliament be summoned to meet on the twenty-third of January in such a year, and, before, the meeting be prorogued to the twenty-fifth, and then holden, and a statute made by such parliament be (g) recited as made in a parliament holden on the twenty-third: Or if a parliament first holden in one year be continued by prorogation to another, and then sit again, and a statute made at such sessions be (h) recited as made in a parliament holden or begun at such second year (which is all one), instead of saying that it was made at a sessions of parliament then holden, and the indictment conclude *contra formam Statuti prædicti*, the variances in strictness are fatal; for the Court will not make any case better than the record has made it; and therefore where that expressly grounds it on the act of a supposed parliament, where there was no such act, the Court will not find one out to make it good. (e) B. Parl. 87. Cro. El. 851. (f) Plover 179, 83, 84. C. Car. 136, 212. 3 Keble 463. 2. Jones 50. Hobart 310. Cro. Jac. 139. C. Eliz. 245. Rut Q. 1. by Coke. 2. Bull. 51. (g) Dyer 20. Hetley 129. (h) C. Jac. 111. 139. Lutw. 140. 4. Inst. 27. 1. Brown 100. Yelver. 127. Dyer 95, 171. Skinner 110, 111.

Also it hath been (i) adjudged, that a repugnancy in setting forth the time when a parliament was holden, is fatal; as if a statute be recited as made on such a day, in the first and (i) Moor 202.

- and second years of such a king, for it is impossible that one and the same day should be in two years. Also it is holden in (a) *Croke's Reports*, that an indictment was discharged for not shewing in what county a parliament was holden; but no reason is given for this opinion: (b) and it hath been adjudged, that the total omission of the day when the parliament was holden, is no fault in the recital of a statute. Also it seems to be (c) agreed, that a mistake in supposing a statute to have been made at a parliament holden in such a year, when in truth it was then holden by prorogation, may be helped by the constant course of precedents upon such statute. Also it seems to be (d) agreed, that not only a mis-recital of the day whereon the parliament was holden, but even a mis-recital of the purview of a statute may be saved by a general conclusion *contra formam statuti*, without adding *prædicti*, &c. But (e) I do not find it settled, whether a fault of this kind can be helped by the defendant's admittance, that there is such a statute as is supposed; and it will be difficult to maintain that the party's admittance of what the Court judicially knows to be contrary to the truth, can make good any indictment.
- (a) C. Eliz. 106.
 (b) Dyer 203.
 (c) Yelver. 127.
 Browal. 100.
 4. Keble 34.
 Dyer 171.
 (d) C. Car. 232, 233.
 Palmer 565.
 Raymond 191, 192.
 3. Keble 647, 648.
 Lutwych 140.
 (e) Affirmed C. Jac. 139.
 Denied C. Eliz. 236.

As to the third of the particulars abovementioned, *viz.* Whether the mis-recital of the title of a statute be fatal.

- (f) Hardr. 324. *Seft.* 105. It is (f) said to have been holden by Sir Matthew Hale, that the mis-recital of the entitling of an act will not vitiate a replication, because it is not matter of substance; and a judgment is (g) said to have been lately given in the court of common pleas agreeable to this opinion; but the contrary is (h) said to have been since adjudged in the court of king's bench.
- (g) 6. Mod. 62.
 (h) 6. Mod. 62.

As to the fourth of the particulars abovementioned, *viz.* What other mis-recitals of a statute are fatal.

- (i) 2. R. Abr. 465. *Seft.* 106. (i) It is said to have been often adjudged, that a variance in reciting a statute to commence after the making, where the statute is express that it shall commence after the end of the sessions, is fatal. But I take it to be a settled rule, that a variance no way altering the sense of the statute does (k) no hurt; as where, in the recital of an oath prescribed by statute, the words, "See of Rome" are put for "See of Rome; and "I do declare in conscience," instead of "I do declare in my conscience."
- (k) 1. Ven. 172.
 Skinn. 11. 52.

- (l) C. Eliz. 186. Also it seems to be (l) agreed, that a variance from an immaterial part of a statute does no hurt, (m) and therefore
4. Coke 48.
 Palmer 565.
 C. Car. 135, 136, 564. 1. Jones 194. (m) Plow. 65, 105. Dyer 203. Hobart 226.
 3. Keble 662.

that

that where a statute contains several branches relating to several distinct matters, an omission of such branches as no way relate to the offence indicted does no hurt, because they are nothing to the present purpose. Also it hath been adjudged, that every mis-recital even of such branch is not fatal; as if it vary only in such a part of the description of the offence, as is put in only by way of flourish, and *et abundanti*, and makes no necessary ingredient in the offence prohibited, nor needs any proof: as if in a prosecution under the statute of 12. Rich. 2. the (a) recital be that "none shall devise, speak, or tell any false news, lies, or other such false things, &c. unde discordia aut aliqua lis (*Anglice Debates*) inter magnates vel inter magnates et communitatem diffini regni omni possint," where the words of the statute are, "That none shall devise, speak, or tell any false news, lies, or other such false things, &c. &c. whereof discord or any slander might arise within the said realm;" for the first words, *viz.* "That none shall devise &c. any false news, lies, or other such false things, &c." are only material. Indeed as this case is reported by *Croke*, there is a mis-recital even in this part; for instead of "other false things," the recital is said to mention "other things," generally, omitting the word "false," but I suppose that this is a mistake of the printer, and that there is no such variance in the record of the case, because no exception is reported to have been taken to it.

Sett. 107. But if a mis-recital of such a part of the purview of a statute be not fatal, it seems *a fortiori* to follow, that a mis-recital of the preamble is not material, where the substantial part of the purview is well recited. And upon this reason chiefly, as I suppose, it hath been adjudged, that if in an action on the (b) statute of HUE AND CRY for a robbery, the declaration recite the preamble to speak of the *burning of houses*, where the statute mentions *arsons* generally, without any particular mention of the arson of houses; or in an action for the slander of an earl, on 2. Rich. 2. c. 5. (c) 2. Jones if the declaration in reciting the preamble mention only what relates to "earls, &c." and omit the clause concerning the "other great officers," (c) yet the plaintiff may have judgment especially after verdict. And these resolutions seem to weaken the authority of *Parker's Case* reported by (d) *Hutton*, wherein it is said to have been holden by three Judges against the opinion of *Hobart*, that the putting of the word *inducari* for *indictari* in the recital of the preamble of the said statute of HUE AND CRY, in a writ grounded thereupon, is fatal.

Sec. 108. If an indictment on the eighth of *Henry the sixth*, in reciting that part of the statute which declares in what actions the party grieved shall recover his damages, after having mentioned recoveries by verdict, omit the (a) words "or in any other manner;" or use the (b) words *assissam novam disseisinam* for *assissam novam disseisinam*; (c) or recite the statute as giving the fine on a recovery by action *dicto domino regi*, where there is nothing to make good the word *dicto*; (d) or recite the statute relating to the bringing an action to be, "if the party after such entry make any feoffment, &c." where the words are, "if after such entry any feoffment be made," or (e) recite it to be, "if any person be put out and disseised" in the conjunctive, where the words of the statute are, "if any person be put out or disseised" in the disjunctive, the variances have been adjudged fatal. Yet (f) it hath been holden, that the last of these is an immaterial variance, because though the words above-mentioned be disjunctive in the statute, they have always been expounded in the copulative. Also it may be questioned how far the rest of these authorities may be law at this day, since of (g) late the Court has not been so strict in recitals as formerly; and if an indictment fully recite a statute so far as it concerns indictments, a misprision in what concerns other matters seems to be much helped by the authorities of the cases above cited.

(a) C. Eliz.
186.

(b) C. Eliz.
393.

(c) 1. Bulst.
218.

(d) C. Eliz.
307.

Parallel Case
C. Eliz. 697.

(e) C. Eliz.
96. 697.

(f) C. Eliz.
397.

(g) 3. Keb.
662.

(h) 20. H. 6.
31, 32. which
seems mis-
taken in the
Abridgments.
F. Brief 86.
B. Champer-
ty 1.
Vide Plow.
84.
Dyer 160.
(i) C. Jac. 133.
(j) Vide C.
Jac. 342.

(k) 4. Co. 12.
13.

Sec. 109. It hath been (b) adjudged, that a total omission of the clause of a statute which ordains what the party shall forfeit, does no hurt. Yet if the statute be wholly mis-recited in such clause, as if the words (i) *admitteret* or *forisfaceret* be used in such clause for *amitteret* and *forisface- ret*, the exception for the variance seems to have greater weight. Yet if the word mis-recited be synonymous with the other which is rightly recited, and the (k) whole pur- port of both as fully expressed in one word, which is pro- perly recited, as if both had been used, as it certainly is in the case above cited, wherein the word *forisfaceret* is rightly recited, and the word *admitteret* mis-recited, it may perhaps be questioned whether such an exception would be fatal at this day, especially considering that it is in a part of the sta- tute which might, as well have been omitted in the recital; and there is no variance but from a word wholly nugatory and superfluous, and the sense would be complete by the rejecting the word mistaken as surplus and insensible. But if in the mis-recital of such a clause, there be such a vari- ance as carries with it a plain material repugnancy to the in- tent of the statute, (l) as where the words, "whoever shall do the same shall incur the pain, &c." are thus recited, "whoever shall do the contrary, shall incur the pain, &c."

I do

I do not well see how any thing can be said to make it good ; for it is a general rule, that (a) repugnancies in indictments are fatal, and the prosecutor himself declares, that not those who do the thing indicted, but those who do it not, are within the penalty of the statute.

As to THE THIRD POINT, viz. How far it is necessary to bring the offence indicted within the very words of the statute.

SECT. 110. I take it for a general rule, that (b) unless the statute be recited, neither the words *contra* (c) *formam statuti*, nor any periphrasis, intendment, or (d) conclusion, will make good an indictment, which does not bring the fact prohibited or commanded, in the doing or not doing whereof the offence consists, within all the material words of the statute. And upon this ground it hath been resolved, that an indictment of rape finding that the defendant such a day and place, &c. *A. B. felonice cepit et eam adtunc et ibidem carnaliter cognovit, &c. contra voluntatem suam, &c.* is not (e) sufficient without the word *rapuit* ; because that is the word used by the statute which makes the offence felony. Also it hath been (f) adjudged, that indictments for perjury on 5. Eliz. c. 9. omitting the words *voluntariè et corruptè*, in setting forth the swearing ; and indictments for striking in a church on 5. & 6. Edw. 6. c. 4. (g) omitting the words " to the intent to strike, &c. ;" and indictments for aiding the procurors of the pope's bulls on 13. Eliz. c. 4. (h) omitting the words " to the intent to set forth, &c. the " *usurped power, &c.*" and indictments for forestalling ; on 5. & 6. Edw. 6. c. 14. setting forth, that the defendant bought certain goods of J. S. which he was about to sell at such a market, but (i) not expressly alledging, that " such goods were then coming to such market to be sold ;" and (k) indictments for ingrossing on the same statute, setting forth, that the defendant bought so much corn, &c. without alledging, that " he ingrossed, &c. by buying, &c." and (l) indictments for treason in compassing the king's death on 25. Edw. 3. having neither the word " compass" nor " imagine, &c." cannot be taken as indictments on such statutes. And the like hath been adjudged in many other (m) cases (21).

2. Leonard 188. Noy 171. (b) Dyer 363. (i) 1. Roll. 421. B. 1. c. 80. f. 12, 13. (k) 2. Leon. 39. B. 1. c. 80. f. 15, 20. (l) Kelyng 8. B. 1. c. 17. f. 8. (m) 11. Coke 58. Dyer 346. 2. Roll. 227. 263. Sup. sect. 104. 2. Roll. Abr. 81. 9. Ed. 4. 26, 27. (21) Vide 1. Hale 190, 191. Cro. Car. 283. And where the words of a statute are descriptive of the nature of the offence ; or the purview of the statute ; or are necessary to give a summary jurisdiction, the indictment must follow the very words. Burrow 1037. But it is said the negative exceptions in a penal statute need not be set out. 1. Black. Rep. 230.

Sec. 111. Neither doth it seem to be always sufficient to pursue the very words of the statute, unless by so doing you fully, directly, and expressly alledge the fact, in the doing or not doing whereof the offence consists, without any the least uncertainty or ambiguity; for it hath been (a) adjudged, that an indictment for perjury on 5. Eliz. c. 9. setting forth, that the defendant *talis per se sacro evangelio falso deposuit, &c.* is not good, without directly shewing that he was sworn. Also it hath been (b) adjudged, that an information on the 18. Hen. 6. c. 17. for not abating so much of the price of wine sold as the vessels wanted of the statute-measure, is insufficient, if it do not expressly shew how much they wanted. Also it is said, that an indictment on the statute of usury, setting forth, that the defendant took more than five in the hundred, is not good, without shewing in particular how much.

Sec. 112. As to the description of the person of the defendant, in order to bring him within the purview of a statute, which extends only to such kind of persons as are specially mentioned in it, it is a good (c) general rule, that every indictment must bring the defendant within all the descriptions mentioned in the body of the act, except they are such as carry with them the bare denial of a matter, the affirmation whereof is a proper and natural plea for the defendant; as where it is enacted, "that all persons having no reasonable excuse to be absent, shall go to their parish church, &c." in which case it is said, that it is not necessary to shew, that the defendant had no reasonable excuse, for this will come most properly in question from the plea of the defendant. (+) Also it seems that there is no need, in describing the defendant, to set forth the place where the thing happened which brought him within the description, as hath been more fully shewn in the eighty-fourth section. Also it hath been adjudged, that it is (d) sufficient in describing the defendant to say, that he *existens* so and so, as the statute mentions, did the fact, without alledging that he was so at the time of the fact; for that shall be intended, as hath been more fully shewn in the sixty-first section.

Sec. 113. It seems (e) agreed, that there is no need to alledge in an indictment, that the defendant is not within the benefit of the provisos of a statute whereon it is founded; and this hath been (f) adjudged, even as to those statutes which in their purview expressly take notice of the provisos; as by saying, that none shall do the thing prohibited,

(a) Pop. 93.
94.
1. Jones 157.
2. Levinz 26.
3. Hail 32.
4. Hale 170.
171.
(f) Pop. 93.
94.

hibited, otherwise than in such special cases, &c. as are expressed in this act.

But as I take it, a conviction on a penal statute ought expressly to shew, that the defendant is not within any of its provisions; for since no (a) plea can be admitted to such a conviction, and the defendant can have no remedy against it, but from an exception to some defect appearing in the face of it, and all the proceedings are in a summary manner, it is but reasonable that such a conviction should have the highest certainty, and satisfy the Court, that the defendant had no such matter in his favour as the statute itself allows him to plead.

Douglas 531.

SECT. 114. It seems to be laid down as a general rule in (b) *Savil's Report*, which is also confirmed by THE YEAR-BOOK of 11. Hen. 4. pl. 14. that if the statute whereon an indictment is grounded be particularly recited, the general conclusion, *contra formam statuti*, after the allegation of the fact, will supply an omission in it of a circumstance mentioned in the statute, which would be fatal without such a recital and conclusion; for since the statute is particularly recited, and the defendant charged with having done the offence against the form of it, and it is impossible that he could so have done, if any circumstance expressly required by the statute had been wanting, it seems that the offence may properly enough be said to be as fully set forth in the very words of the statute, as if such words had been repeated in the allegation of the offence, according to the common rule, that *verba relata hoc maxime operantur per referentiam ut inesse videantur*. Neither do I find this contradicted by any of the resolutions in the precedent sections; for it does not appear that there was such a recital and conclusion in any of the indictments therein referred to (c). Yet notwithstanding the omission of a circumstance mentioned in a statute, may perhaps in such manner be holpen, it seems that the want of a certain description of the time or the place, or the things or the persons concerned, or of the conclusion *contra pacem*, or an express and direct allegation of the fact itself, cannot be so supplied; for such omissions (d) vitiate an indictment drawn in the very words of the act.

(b) Savil 33.
Sup. c. 23.
f. 63.
2. Roll. 227.
S. P. C. 84.

(c) See Rex
v. Salomon,
1. Term Rep.
251.

(d) 2. Roll. 226.
seems contra.

AS TO THE FOURTH POINT, viz. Whether an indictment grounded on a statute which will not maintain it, may be made good as an indictment at common law.

(a) C. Eliz. 311. 397. 697. taken for granted, that no indictment whatsoever which is grounded on a statute, and concludes *contra formam statuti*, and cannot be made good by the statute, can be maintained as an indictment of an offence at common law. The chief reason whereof seems to be this, that it appears that the prosecution is intended to be grounded on a foundation which will not support it. But the contrary seems to have been adjudged in *Page's Case*, (b) wherein it was resolved, that if persons be indicted specially on the statute of stabbing, and the evidence be not sufficient to bring them within the statute, they may be found guilty of general manslaughter at common law, and that the words *contra formam statuti* shall be rejected as senseless, where the offence is prohibited by the common law only. And the same hath been since (c) adjudged as to other statutes; and, as I took it, was lately agreed in an information against the City of (d) Norwich (e).

(f) King v. City of Norwich, Hil. 5. Geo. 1. 1. Cowper 648. (e) Vide also *Rex v. Smith*, Trin. 20. Geo. 3. Doug. 441. 445. and *Rex v. Mathews* 5. Term Rep. 162.

AS TO THE FIFTH POINT, viz. How far it is necessary for an indictment on a statute to conclude *contra formam statuti*.

SECT. 116. It seems that judgment on a statute shall in no case be given on an indictment which does not so conclude; for granting that such judgment may in some cases be given in an action brought at common law, without a reference to any statute, as it is (f) said that judgment on 8. Hen. 6. c. 9. may be given on the old common-law writ of assize of *novel disseisin*, yet it will not follow, that such judgment can in any case be given on an indictment drawn as for an offence at common law, without any reference to statute. For as to the said case of an assize of *novel disseisin*, it may be said that the statute of 8. Hen. 6. expressly says, "That the party may recover by such writ;" and therefore since there is no special writ of this kind formed upon the statute, and the party has (g) no authority to make out a writ himself in a new form, it is reasonable that he may recover by the old writ. But it (h) seems that judgment on this statute cannot be given on an action of trespass in the common law form, because there is a special writ of trespass in THE (i) REGISTER grounded on the statute; and it seems to be (k) agreed, that where there is a special writ grounded on a statute, judgment shall never be given on such a statute in an action brought at common law.

(l) 1. Inst. 407. (m) 2. Inst. 200. B. Parl. 75. (n) Reg. 289. (o) 9. H. 6. 2. 50. H. 6. 54. Ed. 3. 10. H. 4. 13. 1. Edw. 4. 39. B. Aft. f. le Stat. 6. 10. Parl. 75. F. Jud. 10. Cessavit 18. Attach. fur. 1. 3. Benloe 57. C. Eliz. 759, 769.

And in like manner, since every one who prosecutes an indictment is at liberty to draw it as he pleases, so that he observes the general rules of law concerning indictments, it seems to be taken as a common ground, that a judgment by statute shall never be given on an indictment at common law, as every indictment which doth not conclude *contra formam statuti*, shall be taken to be. And therefore (a) if an indictment do not conclude *contra formam statuti*, and the offence indicted be only prohibited by statute and not by common law, it is wholly insufficient, and no judgment at all can be given upon it. But if the offence were also an offence at common law, I take it to be in a great measure settled at this day, that (b) judgment may be given as for an offence at common law, though the indictment conclude *contra formam statuti*, as hath been more fully shewn in the precedent section.

(a) 2. Roll.
88.
1. Saund. 249.
1. Siderfin
409.
2. Keble 506.
1. Salkeld 370.
Douglas 445.
Cowp. 30.
(b) See f. 115.
2. Keble 477.
1. Siderfin 409.
1. Saunders
249.

9. H. 6. 56. F. Attach. sur Pro. 1. 3. But 2. R. Abr. 82. 2. Keble 379, 380. seem contra. Vide 2. Hale 190, 191. Cro. Car. 283.

SECT. 117. If there be more than one statute concerning the same offence, and the first of them was never discontinued, and the latter only (c) continue the former without making any addition to it, or only (d) qualify the method of proceeding upon it, without altering the substance of its purview, it seems agreed, that it is safe, in an indictment on any such statute, to conclude *contra formam statuti*; and it hath been (e) holden, that a conclusion *contra formam statutorum*, will in such cases vitiate the prosecution.— But where a statute hath been wholly discontinued, and is afterwards revived, there (f) seem to have been some opinions, that a prosecution on it ought to conclude *contra formam statutorum*.

(c) C. Eliz.
250.
Owen 135.
1. Lit. 223.
2. Hale 173.
(d) Yelv. 116.
C. Jac. 187.
(e) Yelv. 116.
C. Car. 187.
(f) Owen 135.
1. Lutw. 228.
2. Hale 173.

Also where the same offence is prohibited by several independent statutes, there are some (g) authorities, that you must either conclude *contra formam statutorum* or *contra formam* of the particular statutes naming them, and that if you barely conclude *contra formam statuti*, the indictment will be insufficient, for not shewing on which of the statutes it was taken. But there are also strong (h) authorities for the contrary opinion, which is also most agreeable to (i) precedents; to which may be added, that if it be a good objection to such an indictment concluding *contra formam statuti*, that it appears not on which of the statutes the prosecution is grounded, the same objection may as well be made to an indictment concluding *contra formam statutorum*; for it no more appears from such a conclusion on what statute the prosecution is grounded, than from the conclusion

(g) C. Eliz.
760. 187.
2. Leonard 3.
C. Jac. 142.
Aley 49, 50.
2. Bull. 258.
Dalton c. 133.
(h) Crom. 104.
5. H. 7. 17.
C. Eliz. 186.
4. Coke 48.
(i) 2. Roll.
Abr. 79. 82.
Dalton c. 129.
Aley 50.
B. 1. c. 81.
f. 10.

- (a) Dyer 155. elusion *contra formam statuti*; and yet it seems to be (a) generally admitted, that a conclusion *contra formam statutorum* is good, where the indictment is for an offence prohibited by several statutes. Also where such an indictment concludes *contra formam statuti*, without shewing what statute is (b) intended, why may it not be said that such statute shall be taken as is most for the king's advantage, as well as where the indictment concludes *contra formam statutorum*, in which case it seems to be admitted, that it shall be so taken?
1. Roll. 227.
2. H. 7. 17.
3. Owen 335.
4. Sup. 1. 90.
5. con.
6. Leonard 5. 2. Roll. 65.

But where a later statute ordains, that a former statute shall be executed in a new case not mentioned in the former, as 8. Hen. 6. c. 9. does, that 15. Rich. 2. c. 2. shall be executed in the case of a forcible detainer, which is not mentioned in 15. Rich. 2. or where a new statute adds a new penalty to an offence prohibited by a former statute, as (c) 23. Eliz. doth that of Twenty pounds for a month's absence from church contrary to the tenor of 1. Eliz. it seems that it may with greater reason be argued, that if the indictment conclude *contra formam statuti*, it will be (d) insufficient, because it may seem that the offence is not punishable by any one statute only. Yet considering that the precedents in these cases generally conclude *contra formam statuti*, and the prosecution in truth depends on the addition made by the later statute, which seems of itself alone sufficient to support it, it may be reasonably argued, and seems agreeable to the later (e) opinions, that such a conclusion may be allowed in these cases also. However, it seems safe in any of the cases abovementioned to conclude *contra formam (f) statuti*, which shall stand either for *statuti* or *statutorum*, or be rejected, in such manner as will best maintain the indictment.

- (c) 1. Mod. 191.
2. Levinz 61.
3. Lutw. 212.
(f) Aleyn 50.
4. Modern 240.
5. Hale 165.
6. con.
7. 602. 843. 1066. Ld. Raym. 1518. Douglas 425.

AS TO THE NINTH GENERAL POINT of this chapter, viz. What ought to be the form of the caption of an indictment.

SECT. 118. I shall take it for granted, that every such caption is erroneous, which doth not set forth with proper certainty, both the court in which, and the jurors by whom, and also the time and place at which, the indictment was found.

For the better understanding whereof I shall endeavour to shew what certainty of this kind is necessary.

1. In respect of the court before which the indictment was found.

2. Of the jurors by whom it was found.

3. Of the time when it was found.

4. Of the place at which the indictment was found.

As to the first of these particulars, *viz.* What certainty is necessary in the caption of an indictment in respect to the court before which it was found.

Sec. 119. It is certain, that every such caption must shew that the indictment was taken before such a court as had jurisdiction over the offence indicted; and therefore if it set forth, that any indictment whatsoever was taken before *J. S.* (a) steward, without shewing to whom he was steward, or in what court; or that an inquisition of death, upon view of the body, was taken before *J. S.* (b) mayor of London, or before *J. S.* steward to (c) such a person, and in such a court, without adding, that he was a coroner; or if it expressly call him coroner, but do not also shew that he was such for the (d) district in which the inquisition was taken, it is insufficient. But it hath been adjudged (e), that it is sufficient to set forth, that it was taken before *J. S.* a coroner in the county, without saying that he was a coroner for the county, for that cannot but be intended.

(a) *Ld. Ray.*
710.

22. *Ed. 4.* 19.
B. Batteil 7.

Indictment 46
(b) 22. *Edw.*
4. 13.

Summary 207.
S. P. C. 96.

(c) 22. *Ed. 4.*
12.

(d) C. Eliz.
193.

2. *Roll. 82.*
22. *Ed. 4.* 16.

B. Bat. 7.
Indict. 46.

(e) *Plow. 76.* 77.
4. *Coke* 41.

Sec. 120. Where (f) the caption of an indictment alleges it taken at the general sessions of the peace of such a county or burgh, it doth not seem necessary to add, that such sessions was holden for such county or burgh, because it could not but be so holden, if it were the general sessions of such a county or burgh; but if it had been only described as a general sessions holden in such county or burgh, it is said (g) to be a fatal exception, that it is not expressly alleged as holden for such county or burgh. But (h) *quære* if this be not helped by putting the county in the margin.

(f) 1. *Sid.* 247.

(g) 1. *Keb.*
329. 668. con.

635.
1. *Levinz* 304.

2. *Keble* 133.
128. 141.

(h) C. Eliz. 490.
Crown Cir.
125.

Sec. 121. There are some (i) authorities, that if the caption of an indictment before justices of peace take no notice of their commission to hear and determine felonies, &c.

(i) S. P. C.
96.

Summary
207.

2. *Keble* 160. B. Indict. 32. But *Qu.* 22. *Edw.* 4. 12, 13. B. Error 186. B. Indictment 50. 2. *Hale* 186. *Lamb.* 46, 47. *Cro. Jac.* 633. 1. *Vent.* 33. and *Rex v. Carter.* Strange 442. exactly in point, upon the authority of which *Rex v. Straw* was quashed, *Hil.* 10. *Geo.* 1. without debate.

which

which is generally done by the clause *nec non ad diversas felonias, &c.* it is insufficient. But having already more fully considered this matter c. 8. s. 33. I shall refer the Reader to what is there said concerning it.

Seft. 122. There are also several authorities, that the caption of an indictment before justices of peace is insufficient, unless either the words (a) *domini regis* or (b) *publicæ* be added after *pacis*. And it hath been sometimes holden, that even the words *domini regis* are not sufficient without the word (c) *nunc*, or some other, to shew whether it were the peace of the present king, or of some of his predecessors. The chief ground of these opinions seems to be the statute of 27. Hen. 8. c. 24. s. 4. by which it is enacted, "That in every writ and indictment that shall be made within any county palatine or liberty, whereby any thing shall be supposed to be done against the king's peace, it shall be supposed to be done against the king's peace, his heirs and successors, and not against the peace of any other person whatsoever; any statute, grant, or usage, to the contrary notwithstanding." From whence, I suppose, it may have been collected, that by parity of reason, justices of peace ought to be styled, in legal proceedings, justices of the king's peace, that it may appear that the peace of no other person, but of the king, is intended. But since this is not expressly required by the said statute, it cannot but be intended, especially at this (d) day, when none but the king can appoint justices of peace, that all justices of peace must be justices of the publick peace, or of the king's peace, which is the same thing. Accordingly exceptions for the want of these words have been often (e) over-ruled; and I take them to be obsolete at this day, as it seemed to be lately settled between the (f) *King and Hawkins* on a conviction of deer-stealing.

- (a) 1. Lev.
175.
2. Keble 647.
1. Sid. 247.
422.
(b) 1. Keb. 37.
1. Siderfin 422.
(c) 1. Sid.
422.
2. Keble 582.

- (d) Vide c. 5.
1. 1.
(e) 2. Keble.
382.
1. Siderfin 247.
Qu. 1. Keb.
656.
1. Siderfin 175.
(f) Adjudged,
M. 3. Geo. 1.
3. Bur. 1903.

- (g) 1. Mod. 24.
2. Keble 580.
C. Eliz. 738.
(h) 1. Bullf.
203.
(i) 2. Keb. 128.
C. Eliz. 738.
Keil. 192, 193
2. Keble 385.
22. Ed. 4. 19.
B. Batteil 7.
Indictment 46
(k) 1. Saund.
263.
(l) 1. Sid. 367.
5. Modern 152.
2. Keble 366.

Seft. 123. But it seems generally agreed, (g) that if the caption of an indictment, at a sessions of the peace, do not mention before whom it was holden, or if it set it forth (b) generally as holden before justices, without shewing any thing of the nature of their commission, or as holden before justices (i) of the peace, &c. without naming any of them, or shewing for what place they were justices, or if it (k) describe them as justices *ad pacem in comitatu prædicti conservand*, omitting the word *assignat*, it is insufficient. (l) Yet it hath been adjudged, that it is not necessary for the caption of an indictment taken at a general sessions of the peace to style any of the justices of the *quorum*, because it sufficiently shews that one or more of them were such, by shewing that the sessions was a general one.

Seft.

Sett. 124. It hath been adjudged, (a) that the caption of (a) 10. Edw. an indictment setting it forth as taken *ad magnam curiam cum leta tentam*, is insufficient. The chief reason whereof seems to be this, that such a caption rather imports, that the indictment was taken at the court which had no jurisdiction to take it, than at the proper one; for it seems to be express, that it was taken at the court baron, and mentions nothing in relation to the court-leet, but that it was holden together with the court-baron. And agreeably hereto it is said in THE YEAR-BOOK of 10. Edw. 4. pl. 15. that if the caption had been *ad magnam curiam et ad letam*, it had been some sense, but that *cum leta* bears no sense. From whence it may be argued, that if a caption set forth an indictment as taken at a court-baron and court-leet, it may be good, because the court-baron having no manner of jurisdiction in criminal matters, and the court-leet having such jurisdiction, it may well be (b) intended that the indictment was taken at the court-leet, and not at the court which had nothing to do with it. *A fortiori* therefore, if an indictment be set forth as taken *ad vis. franci pleg. cum cur' baron' tent'*, it shall be intended to have been taken at the court-leet; as it is (c) said to have been holden by the late chief justice HOLT, who yet seemed to be of opinion, that if a court-baron had a jurisdiction of such matters as well as a court-leet, but in a different manner, such a caption would have been insufficient, for not shewing more expressly at which of the courts the indictment was taken.

Sett. 125. It hath been adjudged, (d) that the not setting forth in the caption of an indictment taken at a leet, whether the court was holden by grant or prescription, is holden by the multitude of precedents.

As to the second particular, *viz.* What certainty is necessary in the caption of an indictment in respect of the jurors by whom it was found.

Sett. 126. It seems agreed, that no caption of an indictment, whether found at a (e) court-leet, or other inferior court, can be good without expressly shewing, that the jurors who found it were of the (f) county, city, or burgh, or other precinct, for which the court was holden, and that they were at least (g) twelve in number, and (h) also, that they found the indictment upon their oaths.—Also, indictments have been (i) quashed for an omission of the names

2. Hale 167. (e) 6. H. 4. (f) Raym. 434. G. Eliz. 677. 2. Keble 160. 3. Keble 807. Vide sup. f. 33. (g) C. Eliz. 654. Sup. f. 15. 6. H. 4. 4. 41. Ed. 3. 31. (b) 2. Keble 676. 1. Siderfin 140. 3. Modern 201. 1. Keble 629. 329. See the cases cited to letters b, c, d, e, f, g, h, sections 122. & 123. p. 360. & 1. Salkeld 371. (i) 2. R. Abr. 82. 2. Keble 470. 6. H. 4. 4. Qu. 2. R. 3. 11. Rastal 553. 606. of

(a) 1. Saund. 249. Vide 13. H. 7. 20. 2. Keble 366. (b) 1. Keble 629. 2. Keble 471. 2. R. Abr. 82. 2. Keble 366. (c) 1. Keble 101. 524. 629. 352. 1. Keble 367. Vide 3. Keble 128. Con. 2. Keble 59. 2. Jones 180. (d) 1. Mod. 26. 1. Keble 583. 610. (e) 2. Keble 471. Shower 272. (f) 1. Sid. 140. 1. Keble 498. (g) 1. Saund. 249. (h) 1. Keble 629. (i) 2. Keble 471. (k) 6. Modern 180. (l) 1. Sid. 140. 1. Shower 272. 6. Mod. 95. (m) 6. Modern 95. 180. (n) R. v. Gravenor, adj. Hil. 3. Geo. 1.

As to the third particular, *viz.* What certainty is necessary in the caption of an indictment, in respect of *the time* when it was found.

Secf. 127. It seems (*o*) agreed, that such caption must set forth a certain day and year when the court was holden, before which the indictment was found (*22*), and must record it as then found in the (*p*) present tense, and not in

(22) The caption stated the sessions to be held *ad festum Epiphaniæ* instead of *Epiphaniæ*, and it was adjudged fatal. Strange 693. An indictment taken at the adjourned sessions must shew when the original sessions began. Strange 865. And if the court is stated to have been held on an impossible day, it will vitiate the indictment. *Rex v. Fearnsly*, Trin. 26. Geo. 3. 1. Term Rep. 316.

the preterperfect (23); for it hath been (a) adjudged, that if (a) 4. Coke it describe the sessions at which the indictment was taken, 48. as holden *die Martis et die Mercurii*, or as holden on such a day in such a year of the king, without (b) ascertaining (b) 2. Keb. 582. what king; or if it set forth the style of the day or year in (c) 1. Mod. any (c) figures but Roman, it is insufficient (24). But it seems to be (d) agreed, that it is sufficient to express the year 78. of the king, without adding that of the Lord. Also it seems, (d) Vide sup. that (e) *exiit presentatum* for *existit* is made good by the f. 80. and c. multitude of precedents. 23. f. 90.

368. 1. Keble 37. 2. Keble 367. 5. Coke 110. F. Indictment 20. B. Indict. 34. 10. Ed. 4. 15.

(23) Vide *Rex v. Hall*, 1. Term Rep. 320. where it is decided that a conviction may state the information in the preterperfect as well as in the present tense.—(24) Vide 2. Hale 170. Strange 261. Andrews 137.

As to the fourth particular, *viz.* What certainty is necessary in the caption of an indictment in respect of the place where it was found.

Seft. 128. It seems agreed, that if such caption either set forth no (f) place at all where the indictment was found, (f) Dyer 69. or do not (g) shew with sufficient certainty, that the place set forth is within the jurisdiction of the court before which (g) C. Jac. it was taken, as where it sets forth the indictment as taken 276, 277. at a sessions of the peace holden for such a county at B. (b) without shewing in what county B. is, otherwise than (b) C. Eliz. by putting the county into the margin, it is insufficient. 137. 606. 738. Also if an act of parliament, whether it be in print or not, 751. appoint, that the quarter-sessions of such a county, shall be holden at such a place only, and not elsewhere, except for cause of the plague, &c. it seems (i) that the caption of (i) Dyer 135. every indictment taken at any such sessions, is insufficient, unless it expressly shew, that it was holden at such place. But it hath been (k) adjudged, that the caption of an in- (k) 5. Coke quisition as taken at B. before J. S. coroner of the king's 120, 121. liberty of B. aforesaid, is good, without expressly shewing (k) Vide Pop. 258. that B. is within the liberty of B. for it cannot but be intended. C. Eliz. 490.

As to the TENTH GENERAL POINT of this chapter, *viz.* Upon what proof, and within what time after the offence, an indictment may be found.

Seft. 129. It (l) seems, that before the first of Edward (l) 34. Keble the sixth no certain number of witnesses was required upon 68. the indictment or trial of any crime whatever. For it B. Corone 220. seems 2. Jones 233.

(a) B. Cdr. 220. seems to be generally (a) agreed, that the statutes of the first and second of *Philip and Mary*, in restoring the order of trial by the course of the common law, took away the necessity of two witnesses in all cases within those statutes; from whence it plainly seems to follow, that they were not required by the common law. It is holden (b) indeed by some, that, by the ancient common law, one witness was not sufficient to convict any person of high treason; and this is said to be grounded on the law of God, expressed both in the Old and New Testament. But granting that one witness was not sufficient for a conviction, it doth not follow but that he might be sufficient for an indictment.

(b) 3. Inst. 26. Raymond 408. See this subject examined very much at large Fof. 232 to 246.

Also, however the law might have stood in relation to these matters before the Conquest, it seems to have been wholly altered long before the statute of *Edward the sixth*. And I rather incline to this opinion, since I find it so little supported by the generality of the authorities cited by *Sir Edward Coke* for the proof of the contrary, which wholly relate either to the proof of an essoin, or of a summons (c) in a real action, or (d) of the default of persons summoned on a jury, or (e) other matters rather less to the point.

(c) Braet. 354. (d) 35. H. 6. 46, 47. (e) 48. Ed. 3. 30. 15. Ed. 4. 1.

And as to the above-recited passages of Scripture, it may be answered, that those in the Old Testament concern only the judicial part of the Jewish law, which being formed for the particular government of the Jewish nation, doth not bind us any more than the ceremonial; and that those in the New Testament contain only prudential rules for the direction of the government of the Church in matters introduced by THE GOSPEL, and no way control the civil constitutions of countries. To which may be added, that whatsoever may be said either from reason or scripture for the necessity of two witnesses in treason, holds as strongly in other capital causes, and yet it is not pretended, that there is or ever was any such necessity in relation of any other crime but treason.

1. Hale 299.

Two witnesses required in treason. Stat. 130. But by 1. Edw. 6. c. 12. f. 22. it is enacted, "That no person or persons shall be indicted, arraigned, condemned, or convicted for any offence of treason, petit treason, or misprision of treason, &c. unless the same offender or offenders be accused by two sufficient and lawful

“lawful *witnesses*, or shall willingly without violence confess the same.”

Sec. 131. Also by 5. and 6. Edw. 6. c. 11. f. 8. it is further enacted, “That no person or persons shall be indicted, Or two lawful accusers.
“arraigned, condemned, convicted, or attainted, for any
“of the treasons in the act mentioned, or for any other
“treasons that then were, or after should be, which should
“after be perpetrated, committed, or done, unless the same
“offender or offenders be thereof accused by two lawful
“*accusers*; which said accusers at the time of that arraignment
“ment of the party so accused, if they be then living,
“shall be brought in person before the party so accused,
“and avow and maintain what they have to say
“against the said party, to prove him guilty of the
“treasons or offences contained in the bill of indictment
“laid against the party arraigned, unless the said
“party arraigned shall willingly, without violence, confess
“the same.”

Sec. 132. But by 1. and 2. Philip and Mary, c. 10. Treasons to be tried as at common law
it is enacted, “That all trials after that statute to be had,
“awarded, or made for any treason, shall be had and used
“only according to the due order and course of the common law.”

Sec. 133. Also by 1. and 2. Philip and Mary, c. 11. before the 1. Edw. 6.
it is enacted, “That all and every person and persons who
“shall be accused or impeached of any of the offences contained
“in that statute, or of any other offence or offences concerning
“the impairing, counterfeiting or forging of any coin current
“within this realm, shall and may be indicted, arraigned, tried,
“convicted or attainted by such like evidence, and in such manner
“and form as has been used and accustomed within the realm,
“at any time before the first year of Edward the sixth.”

Sec. 134. By 7. Will. 3. c. 3. it is further enacted, Two lawful witnesses required in open court.
“That no person or persons whatsoever shall be indicted,
“tried or attainted of high treason, whereby any corruption
“of blood may or shall be made to any such offender or offenders,
“or to any the heir or heirs of any such offender or offenders,
“or of misprision of such treason, but by and upon the oaths and
“testimony of two lawful witnesses, either both of them to the same
“overt act, or one of them to one, and the other of them to another
“overt act of the same treason, unless the party
“indicted

“ indicted and arraigned, or tried, shall willingly, without violence, *in open court* confess the same, or shall stand mute, or refuse to plead; or in cases of high treason, shall peremptorily challenge above the number of thirty-five of the jury.”

Indictment to be found within three years.

Seet. 135. And by 7. Will. 3. c. 3. it is further enacted, “ That no person or persons whatsoever (such only excepted as shall be guilty of designing, endeavouring, or attempting any assassination on the body of the king, by poison or otherwise), shall be indicted, tried or prosecuted for any such treason as aforesaid, or for misprision of such treason, that shall be committed or done within the kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*, unless the same indictment be found by a grand jury within three years next after the treason or offence done and committed.”

Vide 20. Geo. 2. c. 30.
Post. c. 39.
f. 12.

Seet. 136. But by 7. Will. 3. c. 7. it is provided, that nothing in this act “ shall any ways extend to any impeachment, or other proceedings in parliament, nor to any indictment of high treason, nor to any proceeding thereupon for counterfeiting his majesty’s coin, his great seal, or privy seal, his sign manual, or privy signet.”

Upon these statutes the following particulars seem most remarkable.

Seet. 137. FIRST, That where the statute of the first of *Edward the sixth* requires, that the party be accused by two lawful witnesses, and that of the fifth and sixth of *Edward the sixth*, that he be accused by two lawful accusers, they both mean the very (a) same thing, because the common law admits of no other accusers but witnesses.

(a) B. Cor. 220.
3. Inst. 25, 26.
Summary 208.
1. Hale 301.

Seet. 138. SECONDLY, That according to the general (b) opinion, it is not required either by the first, or the fifth and sixth of *Edward the sixth*, that such accusers or witnesses be present with the indictors in person, but that they may send their accusation to the indictors in writing under their hands, which will be sufficient even after their death. Also it is observable, that the books which speak of this matter do not expressly say, that such accusation must be upon oath, but surely this cannot but be intended; for how can any accuser be said to be a lawful witness, if he be not upon his oath? But this is cleared by the seventh of *William the third*; as to the treasons within that statute; for it expressly provides, “ that no person shall be indicted
“ thereof, .

(b) S.P.C. 164.
B. Corone 2.
Summary 208.
But 3. Inst. 25,
26. seems contrary.

1. Hale 302.

"thereof, but by and upon the oath and testimony of two lawful witnesses."

Sect. 139. THIRDLY, By the judgment both of *Coke* (a) and *Hale*, (b) one who can only witness, by hearsay, what he has heard a good witness say, is not a lawful accuser within any of these statutes; for if this were to be allowed, nothing would be more easy than, in any case, where there is one witness, to get a second, which would totally elude the provision of the statutes in requiring two lawful witnesses, &c.

(a) 3. Inst. 25.
(b) Sum. 208.
11. Hale 306.
Con. Dyer 99.
S. P. C. 164.
Foster 234.

243.
B. Cor. 220.

Sed vide sup. f. 134.

Sect. 140. FOURTHLY, That the words, "unless the party shall willingly, without violence, confess the same," in the 1st, and 5. and 6. Edw. 6. are to be understood (c) where the party accused upon his examination, before his arraignment, willingly confesses the same without torture: But it is observable, that 7. Will. 3. is thus expressed, "unless the party indicted and arraigned, or tried, shall willingly, without violence, in open court confess the same."

(c) 2. Andr. 66.
1. Hale 304.
3. Inst. 25.
Kelyage 18.
2. St. Tr. 438.
N. B. It was decided in *Francis's* case,

6. St. Tr. 58. that these words only mean a confession upon the arraignment of the party. Foster 241.

Sect. 141. FIFTHLY, That one witness to one and another witness to another overt act of the very same (d) treason, have been construed to be sufficient, within the statutes of the first, and the fifth and sixth of *Edward the sixth*; and the express words of the seventh of *William the third* are agreeable hereto.

(d) Raym. 407.
Kelynge 9.
3. St. Tr. 204.
Foster 237.

And a collateral fact, not tending to the proof of the overt acts, may be proved by one witness, *Salkeld* 634. 5. *State Trials*, 17. or by the confession of the prisoner, 8. St. Tr. 255. for the words of the statute are confined to the proof of the overt acts, *Fol.* 242.

Sect. 142. SIXTHLY, That the statute of 1. and 2. Philip and Mary, c. 10. by enacting, "That all trials of treason shall from thenceforth be according to the course of common law," doth not (e) take away the necessity of two witnesses upon an indictment, required by the 1st, and 5. and 6. Edw. 6. c. 6. because the indictment is no part of the trial, but is more properly the accusation to be tried.

(e) S. P. C. 90. 164.
3. Inst. 24.
to 27.
B. Cor. 220.
Foster 235.

Sect. 143. SEVENTHLY, (f) That the said statute of (f) B. Cor. 1. and 2. Philip and Mary doth not extend to misprison of

treason. But this is expressly provided for by 7. Will. 3. as to such treasons as are within that statute, and therefore there must be two witnesses to the indictment, as well as to the trial of every such misprison.

(a) B. Cor.
220.
3. Inst. 24.
Foster 233.

Sec. 144. EIGHTHLY, That (a) petit treason is within the 1st. and 5. and 6. Edw. 6. and 1. and 2. Ph. & Mary, c. 10. but not within the 7. Will. 3.; from whence it follows, that two witnesses are required to the indictment, and not to the trial of it; and that two witnesses are not necessary even upon the indictment, if (b) the party, upon his examination, confess it.

(b) Vide sup.
f. 140.

(c) 1. Jones
233.
Vide B. Cor.
220.
3. Keble 68.

Sec. 145. NINTHLY, That the statute of 1. and 2. Ph. and Mary, c. 11. which enacts, "That all persons accused of any offences concerning the impairing, counterfeiting or forging the coin, shall be indicted and tried as at the common law," hath been construed (c) to extend to clipping, and all other offences in impairing the coin, which have been made treasons since the said statute of 1. and 2. Ph. and Mary. From whence it may be probably argued, that the statute of 7. Will. 3. by "expressly providing, that nothing therein shall extend to high treason for counterfeiting the coin," intended in like manner, that it should not extend to any other high treason concerning the coin.

INDICTMENTS, being the foundation of all capital prosecutions, found in the absence of the party accused, and only the evidence for the king adduced, it is necessary that the proof of the offence should be substantial, Lord Coke 3. Inst. 25—And it has been observed, with great strength of argument, that a grand jury ought to have the same persuasion of the truth as a petty jury, or a coroner's inquest, 4. State Trials, p. 183. But it is said by Lord Hale, 2. vol. 157. and confirmed by Pemberton, C. J. in Lord Shaftsbury's case, 3. State Trials, p. 415. that as an indictment is merely an accusation, and the party is afterwards to undergo a full trial, they ought upon *probable evidence only* to find the bill. And it has been lately decided by all the Judges, that a person committed as a principal in the same felony with another, and taken from his confinement before the grand jury, by a surreptitious order to the gaoler, and without authority strictly regular, is a competent witness for that purpose. Indeed, many of the Judges were inclined to think, that if a grand jury should find a bill upon evidence *palpably improper*, and the party be afterwards convicted on it by *lawful evidence* before the petty jury, the validity of such a conviction could not be impeached, Dr. Dodd's case, O. B. February sessions 1777. Cases in Crown Law 141. A GRAND JURY however ought not to find an indictment upon the evidence of incompetent witnesses; and therefore where an indictment against one Crossley was presented, and the only names on the back of it were Priddle and Holloway; and the Grand Jury, on its being proved to them that these two persons had been convicted of conspiracy, applied to the Court at the Old Bailey in October sessions 1788; the Court told them, that they ought not to find the bill on such testimony alone; for having been convicted of an infamous crime, their competency was destroyed. MS.

As to THE ELEVENTH GENERAL POINT, viz. In what cases an indictment may be quashed.

SECT. 146. I take it to be (a) settled, that by the common law the Court may, in discretion, quash any indictment, for any such insufficiency, either in the caption, or the body of it, as will make any judgment whatsoever, given upon any part of it against the defendant, erroneous.

Yet it seems, that Judges are in no case bound, *ex debito justitiæ*, to quash an indictment, but may oblige the defendant either to plead or to demur to it. And this they generally do where it is for a crime of an enormous or public nature, as perjury, forgery, sedition, nufances to the highways, and other offences of the like nature.

158. 161. Burrow 1127. 1129. 2116.

Neither will the Court quash an indictment removed by *certiorari*, if a recognizance for the trial of it hath been forfeited (25).

(25) Between quashing indictments and arresting the judgment, quashing is the strongest way; because they must be very grossly bad to have the Court to destroy them at once. 1. Black. 275. Even on the part of a prosecutor, the Court will see that no mischief or oppression ensues, and will impose terms before they grant leave to quash an indictment. 1. Black. 461. Vide Douglas 239. 3. Burrow 1468. For although it is frequently done, Fos. 105. Cro. Car. 147. yet it is by no means of course, Strange 946. But the reason of not quashing on motion, but leaving the party to demur, does not hold where the objection is to the jurisdiction of the Court that has undertaken to proceed. 1. Burr. 389. — For a detail of cases from the modern Reporters, in which the Court will or will not quash indictments, vide 3. Bac. Abr. 116, and 3. Comyn's Digest, p. 508. to 510. [H]

SECT. 147. Also it is enacted by 7. Will. 3. c. 3. "That no indictment for high treason, or misprision thereof (except only indictments for counterfeiting the king's coin, seal, sign or signet), nor any process or return thereupon, shall be quashed on the motion of the prisoner, or his counsel, for miswriting, mis-spelling, false or improper Latin, unless exception concerning the same be taken and made in the respective court where such trial shall be, by the prisoner, or his counsel assigned, before any evidence given in open court upon such indictment; nor shall any such mis-writing, mis-spelling, false or improper Latin, after conviction on such indictment, be any cause to stay or arrest judgment thereupon: But nevertheless, any judgment given upon such indictment shall and may be liable to be reversed upon a writ of error, in the same manner, and no other, than as if this act had not been made."

How exceptions to an indictment for high treason shall be taken.

SECT. 148. It hath been settled (c) in the construction of this statute, that no such exception can be taken, after plea pleaded.

(c) Rookwood's Case, 4. St. Tr. 673. to 676.

(a) 1. Sid. 34. *Sect.* 149. It is said (a) in *Siderfin's Reports*, that the Court never (b) quasheth an information exhibited by a common person, but that it will quash an information exhibited by the attorney-general, or by the master of the crown office, upon motion, if there be cause: But this was denied in one (c) *Nixon's Case*, wherein the Court seemed to be agreed, that they never have, or will quash any information whatsoever.

152. 140.
 Strange 953.
 1803. 1072.
 Andrews 174.
 216.
 (b) 1. Keble
 855.
 (c) Rex v.
 Nixon, Trin.
 5. Geo. 1.
 Strange 185. Burrow 385. B. R. H. 365. Vide Douglas 239. Salkeld 372.

As to THE TWELFTH GENERAL POINT of this chapter, viz. What may be pleaded to an indictment, and in what manner.

Sect. 150. Having already shewn in this chapter how a defendant may plead (d) to an indictment, that the indictors were returned contrary to the purview of 11. Hen. 4. c. 9. and having also (e) shewn, how he may plead a misnomer, or wrongful addition; and intending in the following part of the book to shew, how he may plead a former acquittal, conviction or attainder, or a pardon, or other special plea, or the general issue; I shall in this place only take notice, that the defendant may plead any plea in abatement of an indictment of felony; and also plead over in bar, and take (f) the *general issue* also, in the same manner as an appellee may do, as hath been more fully shewn Ch. 23. *Sect.* 127. 138.

(d) Sup. f. 15.
 (e) Sup. f. 70,
 71, 72.
 Vide c. 23.
 f. 103.
 (f) Finch 385.
 Summary 202.
 249. 254.
 1. Hale 239.
 4. Comm. 332.

CHAPTER THE TWENTY-SIXTH.

OF INFORMATION.

INFORMATIONS are of two kinds. **FIRST**, Such as are merely at the suit of the king. **SECONDLY**, Such as are partly at the suit of the king, and partly at the suit of the party.

For the better understanding of the first of these, I shall endeavour to shew,

1. In what cases Informations at the suit of the king will lie.
2. What ought to be the form of Informations at the suit of the king.
3. How the law concerning them hath been altered by statute.

As to the **FIRST POINT**, viz. In what cases such informations at the suit of the king will lie.

Sec. 1. It hath been holden, that **THE KING** shall put no (a) one to answer for a wrong done principally to another, without an *indictment* or *presentment*, but that he may do it for a wrong done principally to himself.

(a) *Theob. b. t. c. 4. f. 9, 10, 11. 12, 13, 14. Finch 336.*

But I do not find this distinction confirmed by experience; for it is every day's practice, agreeable to numberless precedents, to proceed by way of **INFORMATION**, either in the name of the *attorney-general*, or of the *master of the crown office*, for offences of the former kind; as for (b) batteries, (c) cheats, seducing (d) a young man or woman from their parents in order to marry them against their consent, or for any other wicked purpose; spiriting (e) away a child to the plantations; rescuing (f) persons from legal arrests; (g) perjuries, and subornations thereof; (h) forgeries; conspiracies, whether to accuse (i) an innocent person, or to impoverish (k) a certain set of lawful traders, &c. or to (l) procure a verdict to be unlawfully given, by causing persons bribed for the purpose to be sworn on a *tales*; and other such like crimes done principally to a private person, as well as for offences done principally to the king, as for

(b) *Pre. 4. & 5. Will. & Ma. Infra, f. 5. Shower 116. (c) Shower 110. 1. Siderfin 431. 7. Modern 40. Skinner 108. (d) C. Car. 557. March 52. 3. Keble 101. 1. Levinz 257. 1. Siderfin 387. 5. Mod. 121. 7. Mod. 39. Carthew 384. but no judgment was given in this case. Skinner 81.*

2. Keble 432. (c) Raym. 474. Skinner 47. 1. Black. 386. (f) Raym. 231. Shower 109. 113. C. Car. 579. (g) Raymond 202. 5. Mod. 342. 7. Mod. 100. Salkeld 78. (h) Shower 111. (i) Raymond 417. (k) 1. Sid. 174. (l) See precedent 1. Saunders 300, 301.

(*a*) Raymond 261. (*b*) libels, (*i*) seditious words, (*b*) riots, false news, (*c*) extortions, nufances, as in not (*d*) repairing highways, or obstructing (*e*) them, or stopping (*f*) a common river, &c. contempts, as in departing (*g*) from the parliament without the king's licence, disobeying (*h*) his writs, uttering (*i*) money without his authority, escaping (*k*) from a legal imprisonment on a prosecution for a contempt, neglecting to keep watch and ward, abusing (*l*) the king's commission to the oppression of the subject, making a return to a *mandamus* of matters (*m*) known to be false; and in general, any other offences against the publick good, or against the first and obvious principles of justice and common honesty.

(*i*) And in this case there must be 14 days notice of trial. . . . Fort. 367. (*b*) 5. Mod. 459. C. Car. 252. Show. 106. Skinner 116. (*c*) Raym. 216. Carthew 226. Bun. 311. (*d*) Raymond 384. Shower 110. 116. 1. Siderfin 140. (*e*) Shower 112. 116. (*f*) Shower 114. 118. (*g*) Ibid. (*h*) C. Car. 253. (*i*) Raymond 185. (*k*) C. Car. 209. (*l*) Shower 116. (*m*) Salkeld 374.

SECT. 2. Also it seems, that of common right such an information, or an action in the nature thereof, may be brought for offences against statutes, whether they be mentioned by such statutes or not, unless other methods of proceeding be particularly appointed, by which all others are impliedly excluded.

Shower 111. 115, 116, 117. 3. Modern 117. 2. Andr. 128. Rastal 686. Vital. 1. Vide 3. Leon. 237. & sup. c. 25. f. 4. 2. Andrews 127, 128.

Vide Shower 109, 110. 2. Hale * 151. *SECT. 3.* But I do not find it any where holden, that such an information will lie for any capital crime, or for misprision of treason.

As to THE SECOND POINT, *viz.* What ought to be the form of such information.

SECT. 4. Having already, in the chapter of INDICTMENTS, incidentally shewn the principal points relating to this matter, I shall only take notice in this place, that, seeing AN INFORMATION differs from AN INDICTMENT in little more than this, that the one is found by the oaths of twelve men, and the other is not so found, but is only the allegation of the officer who exhibits it, whatsoever certainty is requisite in an indictment, the same at least is necessary also in an information, and consequently, as all the material parts of the crime must be precisely found in the one, so must they be precisely alledged in the other, and not by way of (*n*) argument or recital.

Black. 93.

(*n*) Salkeld 375.

Yet it hath been adjudged, that where an information of perjury was drawn in this manner, "*Nemorandum quod* A. B. "
" &c.

" &c. *dat Curie hic intelligi et informari quod Termino sancti Hill, &c. in rotulis continetur sic*, viz. that such an action^{70.} was brought, and a trial had thereon, &c. *Et quod* the defendant, at such trial, took such an oath, which was "false," &c. without adding before such mention of the false oath, "*et ulterius dat Cur. hic intelligi*;" yet by reason of the late precedents the information is as (a) sufficient, at (a) Raym. least after verdict, as if those words had been added. It 34, 35. must be confessed, that this is the most reasonable construction, for how can it be intended that it could be contained in the record of the trial, that such an oath was taken at it, or that it was false?

As to THE THIRD POINT, viz. How the law concerning such informations hath been altered by statute.

SECT. 5. It is recited by 4. & 5. Will. and Mary, c. 18. "That divers malicious and contentious persons had more of late, than in times past, procured to be exhibited and prosecuted informations in their Majesties court of king's bench at *Westminster*, against persons in all the counties of *England*, for trespasses, batteries, and other misdemeanors, and after the parties so informed against had appeared to such informations, and pleaded to issue, the informers had very seldom proceeded any further, whereby the person so informed against had been put to great charges in their defence; and although at the trials of such informations verdicts had been given for them, or a *nolle prosequi* entered against them, they had no remedy for obtaining costs against such informers." And thereupon it is enacted, "That the clerk of the crown, in the said court of king's bench, for the time being, shall not without express order, to be given by the said Court, in open court, exhibit, receive, or file any information for any of the causes aforesaid." The matter of the crown office shall not file any information without leave of the Court. 1. Black. 543. B. R. H. 247.

And by 4. and 5. William and Mary, c. 11. "The said clerk shall not issue out any process thereupon, before he shall have taken, or shall have delivered to him a recognizance from the person or persons procuring such information to be exhibited, with the place of his, her, or their abode, title or profession, to be entered to the person or persons against whom such information or informations, is or are to be exhibited, in the penalty of twenty pounds, that he, she, or they will effectually prosecute such information or informations, and abide by, and observe such orders as the said Court shall direct: which recognizance the said clerk of the crown, and also every justice of the peace of any county, city,

"city, franchise, or town corporate (where the cause of
 "any information shall arise), are by the same statute im-
 "powered to take."

Recognizance
 to be filed.

And by 4. and 5. Will. and Mary, c. 18. it is further
 enacted, "That after the taking thereof by the said clerk
 "of the crown, or the receipt thereof from any justice
 "of the peace, the said clerk of the crown shall make
 "an entry thereof upon record, and shall file a memo-
 "randum thereof in some publick place in his office, that
 "all persons may resort thereunto without fee."

Defendants
 entitled to
 costs unless
 the Judge
 certifies.

And by 4. and 5. William and Mary, c. 18. it is fur-
 ther enacted, "That in case any person or persons against
 "whom any information or informations for the causes
 "aforesaid, or any of them, shall be exhibited, shall
 "appear thereunto, and plead to issue, and that the
 "prosecutor or prosecutors of such information or infor-
 "mations, shall not at his and their own proper costs and
 "charges, within one whole year next after issue joined
 "therein, procure the same to be tried; or if upon such
 "trial a verdict pass for the defendant or defendants, or in
 "case the same informer or informers procure a *nolle prose-*
 "*qui* to be entered; then, in any of the said cases, the said
 "court of king's bench is authorized to award the said
 "defendant or defendants, his, her, or their costs, unless
 "the Judge, before whom such information shall be tried,
 "shall at the trial of such information, in open court, cer-
 "tify upon record, that there was reasonable cause for ex-
 "hibiting such information."

Str. 1131.

Recognizance
 shall stand as
 a security for
 costs.

And by 4. and 5. Will. and Mary, c. 18. it is further
 enacted, "That in case the said informer or informers shall
 "not within three months next after the said costs taxed,
 "and demand made thereof, pay to the said defendant or
 "defendants the said costs, then the said defendant and
 "defendant shall have the benefit of the said recognizance,
 "to compel them thereunto."

The Attorney
 General not
 restrained by
 this act from
 filing INFOR-
 MATIONS as
officio.

Sec. 6. But by 4. and 5. Will. and Mary, c. 18. it is
 provided, "That nothing hereof shall extend, or be con-
 "strued to extend, to any other information than such as
 "shall be exhibited in the name of their Majesties *Coroner*,
 "or *Attorney*, in the court of king's bench, for the time being,
 "commonly called the master of the crown-office."

From whence it follows, that informations exhibited by
 THE ATTORNEY-GENERAL remain as they were at the
 common law.

For

For the better understanding this statute, I shall endeavour to shew,

1. In what cases the Court will order an information to be filed.

2. How the party may be relieved against process issued against him, before any recognizance given.

3. Where the defendant shall have costs.

4. Whether it extends to all kinds of informations.

As to the first particular, *viz.* In what cases the Court will order an information to be filed.

Sec. 7. It seems to have been the general practice not to make such an order, without first making a rule upon the person complained of to shew cause to the contrary; which rule is never granted, but upon motion made in open court, and grounded upon affidavit of some misdemeanor, which if true, doth either for its enormity or dangerous tendency, or other such like circumstances, seem proper for the most publick prosecution. And if the person upon whom such rule is made, having been personally served with it, do not, at the day given him for that purpose, give the Court good satisfaction, by affidavit, that there is no reasonable cause for the prosecution, the Court generally grants the information; and sometimes upon special circumstances, will grant it against those who cannot be personally (a) served with such rule, as if they purposely absent themselves, &c.

Law of N. H.
Prins 219.

(a) Strz 1044.
B. R. H. 271.

Sec. 8. But if the party on whom such rule is made, shew to the Court a reasonable cause against such prosecution; as that he has been before indicted for the same cause, and acquitted; or that the intent of the (b) prosecution is to try a civil right, as the title to land, &c. which is not yet determined; or that the complaint is trifling, vexatious, or oppressive (c), the Court will not grant the information, unless there be some particular and extraordinary circumstances in the case; the determination whereof being wholly left to the discretion of the Court, cannot well come under any certain stated rules.

(b) C. Jac. 272.
4 Burr. 1963.
2024.
B. R. H. 242.

(c) A party applying for an information must waive his right of action; but if the Court on hearing the whole matter are of opinion that it is a proper subject for an action, they may give the party leave to bring it. *Rex v. Sharren*, 1. Term Rep. 198.

- † *Señt. 9.* THE COURT will not grant an information against a private person for reading a pretended proclamation (a). Nor against a husband for endeavouring to retake his wife contrary to articles of separation (b). Nor against persons who assemble with a lawful design, notwithstanding some unlawful and irregular acts ensue (c). Nor against justices acting improperly in their publick capacity, unless flagrant proof of corruption appears (d). Nor against ministers for converting brief-money (e). Nor for bribing electors (f). Nor for a perjured intrusion to a living, upon an affidavit that it was simoniacal (g). Nor for a libel if it appear to be true (h). Nor for offences committed upon the high seas (i). Nor against a dissenter for refusing the office of sheriff (k). Nor against an offender, although the penalty of the offence is vested in the Crown (l). Nor for words spoken of a justice in his publick character (m). Nor for attempting subornation (n). Nor for sending a challenge, if the informant had previously imparted a challenge (o). Nor in favour of one cheat against another cheat (p). Nor for a general charge of extortion (q). Nor for striking a magistrate in the execution of his office, if the magistrate struck first (r). Nor for an offence against a private statute (s). Nor if a civil suit is depending upon the same subject (t). Nor against the members of a corporation for a misapplication of the corporation money (u). Nor against a magistrate for having improperly convicted a person, unless the party complaining make an exculpatory affidavit (v). And in general the discretion of the Court in granting an information is guided by the merits of the person applying; by the time of the application; by the nature of the case; and by the consequences which may possibly result from the granting it (w).
- (a) 1. Black. Rep. 2.
 (b) 1. Black. Rep. 18.
 (c) 1. Black. Rep. 48.
 (d) 2. Strange 1181.
 Burr. 785.
 1162.
 Black. Rep. 432.
 Douglas 589.
 1. Term Rep. 653.
 (e) St. Tr. 113.
 Black. Rep. 443.
 (f) Black. Rep. 541.
 (g) Str. 70.
 (h) Str. 498.
 Douglas 284.
 387.
 3. Bac. Ab. 475.
 (i) 1. Str. 918.
 (k) 2. Str. 1193.
 1. Willf. 18.
 (l) 2. Str. 1234.
 (m) 2. Str. 1157.
 (n) B. R. H. 24.
 (o) Burr. 316.
 402.
 (p) Burr. 348.
 (q) Strange 999.
 (r) B. R. H. 240.
 (s) Burr. 385.
 (t) B. R. H. 241.
 (u) Black. 342.
 (v) Rex v. Watson, 2. Term. Rep. 199.
 (w) Rex v. Webster 3. Term Rep. 388.

- † THE COURT will grant an information for reproaching the office of magistracy, or defaming the character of magistrates (x). For taking away a young woman from her guardian, although chancery has committed the offender for a contempt (y). Or from her putative father (z). For not examining evidence upon oath under a reference and rule of court (aa). Or for demanding a shilling, by a justice, to discharge his warrant, and committing the party for not paying it (bb). For seducing a man to marry a pauper in order to exonerate the parish (cc). For seducing a woman, habituated to drinking, to make her will (dd). For voluntarily absenting, by a justice, from sessions (ee). For refusing
- (x) Carth. 14.
 (y) 2. Str. 1107.
 Andr. 310.
 (z) 1. Str. 1162.
 (aa) 1. Willf. 7.
 (bb) 1. Willf. 7.
 (cc) 1. Willf. 41.
 (dd) 2. Burr. 1099.
 (ee) 1. Str. 22.

fusing to put an act in execution (a). For bribing persons (a) 1. Str. to vote at corporation elections (b). For publishing an obscene book (c). For blasphemy (d). For unduly discharging a debtor by judges of an inferior court (e). For refusing, by the captain, to let the coroner come on board a man of war (f). For keeping great quantities of gunpowder (g). For a justice making order of removal and not summoning the party (h). For impressing a captain as a common seaman maliciously (i). For speaking treasonable words, although the offender has been previously punished; viz. in an academical way, by the vice-chancellor (k). For contriving the escape of French prisoners (l). For giving a ludicrous account of a marriage between an actress and a married man (m). For contriving pretended conversations with a ghost with intention to accuse another of having murdered the body of the disturbed spirit (n). For procuring a female apprentice to be assigned, though with her own consent, to another, for the purposes of prostitution (o). Against a justice of peace as well for granting as for refusing an alehouse licence improperly (p). Against a justice of the peace who from illegal and corrupt motives discharges the person committed by another magistrate under the vagrant act (q). For entering libellous reflections in the books of a corporation respecting the administration of justice in a cause in which the corporation were party (r). Against a person whose trial is coming on at the assizes for distributing hand-bills in the assize town, vindicating his conduct and reflecting on the prosecutors (s).

(a) 1. Str. 413.
(b) 2. Lord Raym. 1377.
(c) 1. Str. 783.
(d) 1. Str. 834.
(e) 1. Hard. 135.
(f) 1. Str. 1097.
(g) 1. Str. 1167.
(h) 1. Andr. 238.
(i) 1. Black. 19.
(k) 1. Black. 37.
(l) 1. Black. 286.
(m) 1. Black. 794.
(n) 1. Black. 392. 401.
(o) 1. Black. 439.
(p) 1. Rex v. Holland.
(q) 1. Term Rep. 692.
(r) 1. Rex v. Brooke.
(s) 1. Term Rep. 190.
(t) 1. Rex v. Watton.
(u) 1. Term Rep. 199.
(v) 1. Rex v. Jolliffe 4. Term Rep. 285.

As to the second particular, viz. How the party may be relieved against process issued against him, before any recognizance given according to the statute.

Stat. 10. It seems that he may move the Court (t) to set it aside, as having issued contrary to the directions of the statute.

(t) 1. Salk. 376.
(u) 1. Lilly 61.
(v) 1. Hardw. 247.
(w) 1. Strange 1042.

As to the third particular, viz. Where the defendant shall have costs—I shall observe,

FIRST, That if the information be tried at bar, the defendant can have no costs within this statute; for the words are, (u) that the Court is authorised to award costs, &c.

(u) 1. Clerk's Case, Farrelly 47. Strange 1131. 874. 33. 1069, 1039. 1042. 1. Black. 356. 1. Wilson 467. 139. 3. Com. Dig. 517. Comb. 345. 225. Douglas 314. 3. Black. 1305. Salk. 192. Bull. N. P. 333 211. Buntuis 90. B. R. 11. 47. Sayer's Law of Costs 290. "unless"

“ unless the Judge before whom the information shall be
 “ tried, shall at the trial, in open court, certify upon record,
 “ that there was a reasonable cause for exhibiting such in-
 “ formation ;” which is most naturally to be understood of
 a trial at *nisi prius* ; and it would be absurd to suppose,
 that the statute intended that the Justices of the king’s bench,
 at a trial before themselves, should make a certificate to them-
 selves : To which may be added, that where a cause is of
 such consequence as to be tried at the bar, it may reason-
 ably be intended to be out of the purview of the statute,
 which was chiefly designed against trifling and vexatious pro-
 secutions.

SecT. 11. SECONDLY, That if there be several defendants,
 and any one of them found guilty, those who are acquitted
 cannot have (a) costs within this statute, and this is agree-
 able to the construction made of the statutes which give costs
 to defendants in civil actions, by force whereof no defendant
 in such like case could recover costs before the statute of
 8. & 9. Will. c. 10.

(a) Salkeld
 294.
 2. Wilson 21.

SecT. 12. THIRDLY, That it hath been adjudged in the
 construction of these words, “ The court of king’s bench is
 “ authorized to award to the defendant his costs, where the
 “ Judge who tries an information does not at such trial
 “ certify, that there was a reasonable cause for the informa-
 “ tion (b),” that the said Court is bound of right, in
 every such case, to award them, whether the acquittal were
 upon the merits, or only from a slip in point of form,
 and howsoever notorious the offence might be, for where
 a Court is authorised by statute to do a matter of jus-
 tice to the party, upon certain circumstances, it has no
 discretionary power of considering whether it ought to do
 it, or not, when a case appears to be within those circum-
 stances.

(b) Reg. v.
 Davis, adj.
 Mich. 10.
 Annæ, and al-
 so Stra. 1131.
 Rex v. Wood-
 fall, vide
 2. Chan. Case
 191.

Vide 29. Geo. 2. c. 34. for To which may be added, that the statute, being general as
 costs respect- to all cases wherein the Judge who tries the information
 ing smuggling doth not certify a reasonable cause, seems to imply, that it
 informations, shall be left to such Judge only for this purpose, to consider
 and also 4. Geo. whether the prosecution were reasonable or not, and it is the
 3. c. 25. prosecutor’s folly not to apply to him.

3. Burr. 1817. † FIFTHLY, That in case the defendant be acquitted on an
 1819. information, he is not intitled to costs beyond the extent of
 Rex v. Fil- the recognizance entered into by the prosecutor, which is
 wood, 2. Term limited by the statute to Twenty Pounds.
 Rep. 145.

SIXTHLY,

† SIXTHLY, That the Court will not (on motion) compel the prosecutor of an information to give security for the costs; in case the defendant should be acquitted, over and above the recognizance in Twenty Pounds required by the statute 4. & 5. Will. and Mary, c. . f. Rex v. Brooke, 2. Term Rep. 197.

† SEVENTHLY, That the prosecutor of an information for a misdemeanor shall pay costs for not proceeding to trial pursuant to notice, notwithstanding issue may not have been joined a twelvemonth. But the liability of a prosecutor of an information to pay costs for not going on to trial, must be understood to relate only to cases where the prosecution is carried on entirely at the instance of a private individual; for if the king's name be more than barely made use of, then the general rule, that the Crown neither pays nor receives costs, attaches. Comb. 225. 419. 2. Stra. 374. B. R. H. 159. 3. Burr. 1804. 1. Black. Rep. 356. 1. Bac. K. B. 275.

† EIGHTHLY, That under the statute of 4. & 5. Will. and Mary, c. 11. f. 3. the representatives of the prosecutor are entitled to the costs taxed during his life, though no personal demand was ever made by him; for though it takes away the remedy by *Attachment* it does not affect the debt, and when costs are taxed they become a debt. But where a rule had been made for the prosecutor of an information to pay costs for not proceeding to trial pursuant to notice, it was held that the executor of the defendant (who died after the making of the rule, but before the costs were taxed) was not entitled to them; nor would he have been liable if the testator had been ruled to pay them. Rex v. Chamberlain, 1. Term Rep. 103. 2. Stra. 374. Hullock 578.

† NINTHLY, that upon shewing cause against a rule for filing informations against two persons, the one for sending the other for carrying a challenge, the Court will, if the circumstances of the case be not very bad, discharge the rule on the defendant's paying the prosecutor's costs. Rex v. Morgan, Douglas 314.

† TENTHLY, That if it appear upon shewing cause against a rule for filing an information against a justice of peace for a misdemeanor in his office, that he has acted rightly and without corrupt motives, the Court will discharge the rule with costs: But if it appear that the justice acted *irregularly*, though without any bad, oppressive, or injurious intention, the Court will discharge the information, but *without costs*. Rex v. Cox, 2. Burr. 785. Rex v. Palmer, 2. Burr. 1162. Rex v. Wroughton, 3. Burr. 1687. Rex v. Fielding, 2. Burr. 722.

CHAPTER THE TWENTY-SIXTH.

CONTINUED.

OF INFORMATION.

IN THE NATURE

OF

QUO WARRANTO.

AS to the fourth particular, *v. z.* Whether the beforementioned statute 3. & 4. Will. and Mary, c. 18. extends to all kinds of information.

Sett. 13. It seems clear, that this statute extends to all informations whatsoever exhibited by the master of THE CROWN OFFICE. And though it may be objected, that an information in the nature of a *Quo Warranto*, being a proper means to try a right, is not within the meaning of the statute, which mentioning trespasses, batteries, and other misdemeanors, may be reasonably construed to intend such other misdemeanors only as are of an inferior nature, like to those specified, which are generally wrangling and frivolous ones; yet seeing this is a remedial law, and therefore ought to be largely construed, and that such information may be as vexatious as any others, and always supposes a usurpation of some franchise, and every such usurpation is certainly a misdemeanor, it hath been settled that this statute doth extend to them.

Finch 322.
2. Inst. 282.
495.
1. Salk. 374.
Carth. 504.
Ld. Raym.
426.
Strange 1042.
Bul. N. P.
210.
1. Com. 485.
3. Com. 263.
4. Com. 307.
1. Black. 34.
46. 187. 579.
1. Bur. 402.
2. Wils. 244.

Sett. 14. But when the offices so usurped were *annual offices*, it was found very difficult and oftentimes impracticable by the laws in being to bring to a trial and determination the right of such persons to the said offices within the compass of the year. And when the offices were not annual, divers acts prejudicial to the good order of such cities were done before the right could be determined. It is therefore enacted by 9. Ann, c. 20. "That in case any person or persons shall usurp, intrude into, or unlawfully hold and

See 1. Geo.
1. ft. 2. c. 13.

Burr. 402.
575. 869.
1485. 1812.
1564. 1963.
2022. 2024. 2120. 2147. 2143. 2277. 2512. Black. 95. Coke's Ent. 527. Salkeld 374.

" execute

“ execute the office or franchise of mayor, bailiff, portreeve,
 “ or other office within a city, town corporate, borough, or
 “ place in *England* or *Wales*, it shall and may be lawful,
 “ to and for the proper officer of the court of queen’s
 “ bench, the court of sessions of counties palatine, or the
 “ court of grand sessions in *Wales*, with the leave of the
 “ said courts respectively, to exhibit one or more informa-
 “ tion or informations, in the nature of a *quo warranto*, at
 “ the relation of any person or persons desiring to sue or
 “ prosecute the same, and who shall be mentioned in such
 “ information or informations to be the relator or relators
 “ against such person or persons so usurping, intruding into,
 “ or unlawfully holding and executing any of the said of-
 “ fices or franchises, and to proceed therein in such man-
 “ ner as is usual in cases of informations in the nature of
 “ a *quo warranto*. ”

And by 9. Ann. c. 20. “ If it shall appear to the said re-
 “ spective courts, that the several rights of divers persons
 “ to the said offices or franchises may properly be deter-
 “ mined on one information, it shall and may be lawful,
 “ for the said respective Courts to give leave to exhibit one
 “ such information against several persons, in order to try
 “ their respective rights to such offices or franchises.

And by 9. Ann. c. 20. “ Such person or persons against
 “ which such information or informations in the nature
 “ of a *quo warranto* shall be sued or prosecuted, shall appear
 “ and plead as of the same Term or sessions in which the said
 “ information or informations shall be filed, unless the
 “ Court, where such informations shall be filed, shall give
 “ further time (1) to such person or persons against whom
 “ such information shall be exhibited, to plead.

(1) After the rules are made absolute against divers defendants, the Court may direct that there shall be only one information against all. Burr. 573. 1270, Vide C. 10 p. 459.

And by 9. Ann. c. 20. “ Such person or persons who
 “ shall sue or prosecute such information or informations in
 “ the nature of a *quo warranto*, shall proceed thereupon with
 “ the most convenient speed that may be.”

SECT. 15. And by 9. Ann. c. 20. it is further enacted and
 declared, “ That in case any person or persons, against whom
 “ any information or informations, in the nature of a *quo*
 “ *warranto*, shall, in any of the said cases, be exhibited in any of
 “ the said courts, shall be found or adjudged guilty of an usur-
 “ pation,

"pation, or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said courts respectively, as well to give judgment of ouster against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices and franchise, &c: (8).

(8) 45. Com. Dig. 389.

2. Modern 234.

Str. 582. 952. Burr. 2277. 2143. 4. Modern 58. Rex v. Ponsonby 25, Geo. 2. Queen v. Blagden, B. R. H. 248. Sayer's Law of Costs 293.

"And by 9. Ann. c. 26. s. 5. it shall and may be lawful to and for the said courts respectively to give judgment that the relator or relators, in such information named, shall recover his or their costs of such prosecution: and if judgment shall be given for the defendant or defendants in such information, he or they, for whom such judgment shall be given, shall recover his or their costs therein expended against such relator or relators, such costs to be levied by a *capias ad satisfaciendum*, *fieri facias*, or *elegit*."

Sec. 16. And by 9. Ann. c. 20. s. 7. "the statute for the amendment (9) of the law, and all the statutes of jeofails, (10) shall be extended to informations in nature of a *quo warranto*, and proceedings thereon, for any of the matters in the said act mentioned."

(9) 11. Hen.

4. c. 3.

(10) 14. Ed.

3. c. 6.

9. Hen. 5. c. 4.

4. Hen. 4. c. 3. 8. Hen. 6. c. 12. & 15. 32. Hen. 8. c. 30. 18. Eliz. c. 14. 21. Jac. 1. c. 13. 16. & 17. Car. 2. c. 8. (styled in 1. Ventris 100. an omnipotent act.) 4. & 5. Ann. c. 16. 9. Ann. c. 20. 5. Geo. 1. c. 13. Vide also 4. Com. 406. 4. Burr. 1099. Str. 1011. Co. Lit. 260. Douglas 115.

Upon this statute a rule was made to regulate the discretion of the Court, that after twenty years possession of a corporate franchise, no information in the nature of *quo warranto* should be granted to disturb it; but that since that time each case stood on its own circumstances; but this being found too long a period, a new general rule was made by the Court, that when a person had been in quiet possession of a corporate franchise for *six years*, they would not under any circumstances suffer it to be disturbed. But the legislature interposed soon afterwards.

See Winchelsea Cause, 4. Burr. Rep. 1963. 2524. Rex v. Dickson, 4. Term Rep. 282.

† And now by 32. Geo. 3. c. 58. in order to secure the freedom of election, and the quiet, good order and tranquillity of cities, boroughs, and towns corporate, IT IS ENACTED, "that the defendant or defendants to any information in the nature of a *quo warranto*, for the exercise of any office or franchise in any city, borough, or town corporate, whether exhibited

From the 1st day of Trinity Term 1793, defendants to informations in the nature of *quo warranto*, for the exercise

cise of any office, may plead the holding it six years or more, &c.

“with leave of the Court, or by his majesty’s attorney general, or other officer of the crown on behalf of his majesty, by virtue of any royal prerogative or otherwise, and each and every of them severally and respectively to plead, that he or they had first actually taken upon themselves, or held or executed the office or franchise which is the subject of such information, six years or more before the exhibiting of such information, such six years to be reckoned and computed from the day on which such defendant so pleading was actually admitted and sworn into such office or franchise; which pleas shall and may be pleaded either singly, or together with and besides such plea as he or they might have lawfully pleaded before the passing of this act, or such several pleas as the Court on motion shall allow; and if, upon the trial of such information, the issue joined upon the plea aforesaid shall be found for the defendant or defendants, or any of them, he or they shall be entitled to judgment, and to such and the like costs as he or they would by law have been intitled to, if a verdict and judgment had been given for him or them upon the merits of his or their title.”

Forfeiture of office within six years before information, may be replied to such plea.

† But by 32. Geo. 3. c. 58. s. 2. it is provided “That in every such case the prosecutor of such information may reply to such plea, any forfeiture, surrender, or avoidance, by the defendant, of such office or franchise happening within six years before the exhibition of such information, whereon the defendant may take issue, and shall be intitled to costs in manner aforesaid.”

Title derived under an election not to be affected on account of defect in the title of the person electing, if he was in the exercise of his office six years previous to the information.

† And by 32. Geo. 3. c. 58. s. 3. it is further enacted, “That if any person or persons against whom any such information as aforesaid shall be exhibited, shall derive title under an election, domination, swearing into office, or admission by any person or persons, the title of such person or persons against whom such information shall be exhibited, shall not be defeated or affected by reason or on account of any defect in the title of such person or persons so electing, nominating, swearing into office, or admitting, in case such person or persons under whom title shall be derived as aforesaid was or were in exercise *de facto* of the franchise or office (in virtue of which he or they so elected, nominated, sworn in, or admitted) at a period six years at least previous to the time of filing such information, and his or their title shall not have been questioned by any legal proceeding carried on with effect.”

† And by 32. Geo. 3. c. 58. s. 4. it is further enacted, Officer having the custody of the records to permit any member thereof to inspect the book of admission of freemen, &c. on penalty of 100k

“ That the mayor, bailiff, sheriff, town clerk, or other officer of any corporation, having the custody of, or power over, the records of the same, shall, upon the demand of any person, being an officer or member of such corporation, on the payment of one shilling, permit such person, on any day or days, except *Christmas day, Good Friday, and Sunday* between the hours of nine in the morning and three in the afternoon, to inspect the books and papers wherein the admission or swearing-in of the freemen, burgesses, or other members or officers of such corporation, shall be entered, and to have copies or minutes of the admission, or the entry of swearing-in of any one or more of such freemen, burgesses, or other members or officers, upon paying sixpence for every one hundred words for writing the same; and if such mayor, bailiff, sheriff, town clerk, or other officer, shall refuse or deny to any person, hereby intitled to demand it, the inspection of such books or papers, or to have copies or minutes thereof as aforesaid, such mayor, bailiff, sheriff, town clerk, or other officer shall, for every such offence, forfeit and pay the sum of one hundred pounds, together with full costs of suit, to him, her, or them, who shall inform and sue for the same, within one year after such offence committed, by action of debt, bill, plaint, or information, in any of his majesty's courts of record at *Westminster*, wherein no essoin, protection, wager of law, nor more than one imparlance, shall be allowed.”

Upon these statutes the following particulars are remarkable.

† FIRST, If a person in answer to a motion for an information *quo warranto* can shew to the Court that his right to the franchise in question has been already determined on a *mandamus*; or that it hath been acquiesced (a) in for six years; or that it depended on the right of those who voted for him, which hath not been yet tried; or that the franchise no ways concerns the public (as all those which relate to the government of a corporation, (b) or the election of members of parliament (c), and fairs, and markets, (d) are said to do), but is wholly of a private nature (e), as a coney warren, &c.; (f) or that the election by which he claims is agreeable to charter; or that he never acted under it, (g) the Court will not grant the information unless there be some particular and extraordinary circumstances in the case.

(a) 1. Burr. 414.
1. Term Rep.
2.
1. Black.
Rep. 470.
(b) Burr.
869.
Black. 187.
(c) Stra. 547.
Douglas 588.
(d) 3. Burr.
1812.
(e) Cro. Eliz.
547.
Stra. 637.

(f) Ld. Raym. 1409. (g) See *Rex v. Whitwell*, 5. Term Rep. 85. Post. pag. 101.

Rex v. Stacie, 1. Term Rep.
Rex v. Spear-
ing, See 1. Black.
 Rep. 471.
 Cowp. 597.
Rex v. Mein,
 3. Term Rep
 395.

† SECONDLY, It is not precisely determined how far a derivative title to a corporate franchise may be impeached when the original holder died possessed of it undisputed; for the rights of electors possessed *de facto* of a franchise, cannot be impeached by an information in the nature of a *quo warranto* against the elected. But when there is no other mode of trying the right of the elector to vote, the Court will grant an information *quo warranto* against the elected.

Rex v. Hearn, 2. Term Rep.
 777.

† THIRDLY, The Court will not grant an information in the nature of *quo warranto* against a person exercising a corporate franchise to which he has been legally elected, until he has been removed by the corporation, although he has committed an offence which might amount to a forfeiture.

Rex v. Bond, 2. Term Rep.
 767.

† FOURTHLY, That the party applying for the information standing in the same circumstances as the person against whom he applies, as when the granting the information may disfranchise so many as to endanger the dissolution of the corporation, the Court will exercise their discretion and refuse the information. But the fact that the defendant's title had been before attached by a similar information and abandoned, will have no influence with the Court.

Rex v. Mort-
lock, 3. Term
 Rep. 300.

† FIFTHLY, The Court will refuse to grant an information in the nature of *quo warranto* because the party applying for it had agreed not to enforce a bye-law upon which he now grounded his attempt to impeach the defendant's title. But it is no objection to an application for an information against a mayor for his not having taken the sacrament within the proper time before his election that the relators concurred in his election, because that defect is a *latent one*, arising from the omission of an act positively required by the legislature.

Rex v. Smith,
 3. Term Rep.
 373.

Rex v. Mein, 3. Term Rep.
 596.

† SIXTHLY, An information in the nature of *quo warranto* lies against a portreeve of a borough and manor, who as portreeve is the returning officer of the borough.

Rex v. Sy-
monds, 4. Term Rep.
 221.

† SEVENTHLY, That an application for an information *quo warranto* made on the affidavits of several persons of whom all but one have consented to the election proposed to be impeached, may be granted on the affidavit of that one if he avow himself to be the relator.

Rex v. Car-
marshen,
 2. Burr. 569.

† EIGHTHLY, No information *quo warranto* can be granted against any corporation as a body for any usurpation on the crown, except in the name of the Attorney General.

NINTHLY,

+ NINTHLY, That where any one of several issues in a *quo warranto* information is found for the prosecuto, on which judgment of *ouster* is given, he is intitled to *costs* on all the issues. Rex v. Downes, 1. Term Rep. 453.

+ TENTHLY, It is not sufficient in an application to the Court for an information, to state that the defendant being elected tendered himself to be sworn in; for there must be a *user* as well as a *claim* of a franchise in order to found an application for an information in the nature of a *quo warranto*. Rex v. Whitmore, 5. Term Rep. 85.

+ ELEVENTHLY, That before the exhibiting of any information in the nature of a *quo warranto*, the relator ought to enter into a recognizance in twenty pounds to pursue the same with effect, &c. pursuant to the statute 4. & 5. Will. and Mary c. 18. before recited; for that statute extends to all informations whatever exhibited by the master of the Crown office; and that if the prosecutor do not plead to trial within a twelvemonth after issue joined, the defendant is intitled to costs to the extent of such recognizance. Carth. 503. Salk. 376. B. R. H. 247. 2. Stra. 1042.

+ TWELFTHLY, That the prosecutor of an information in the nature of a *quo warranto* shall pay costs for not proceeding to trial pursuant to notice. 1. Stra. 33. Sayer 130.

+ THIRTEENTHLY, That if any one of several issues in a *quo warranto* information be found for the prosecutor upon which judgment of *ouster* is given, he is intitled to *costs* on all the issues. Rex v. Downes, 1. Term Rep. 453.

+ FOURTEENTHLY, That the statute 9. Ann. c. 20. does not extend to give costs in an information in the nature of a *quo warranto*, unless for the usurpation, &c. of corporate offices and rights to freedom in corporations, or other corporate rights. Rex v. Williams, 1. Burr, 402. 1. Black. Rep. 93.

+ FIFTEENTHLY, That a defendant in execution for the contempt and for the costs on a *quo warranto* information is intitled to be discharged under the lords' act. Rex v. Pickersgill, 4. Term Rep. 309.

+ SIXTEENTHLY, That the Court will in its discretion, and according to the circumstances of the case, discharge a rule for a *quo warranto* information with costs. 2. Stra. 1039. 2. Burr. 786. 4. Burr. 1962.

CHAPTER THE TWENTY-SIXTH.

CONTINUED.

OF

INFORMATION QUI TAM.

AND now I am, in the second place, to consider the nature of such information as is partly at the suit of *the king*, and partly at the suit of *the party*, which is commonly called an INFORMATION QUI TAM.

And this having a great affinity with actions on statutes, I shall consider them together, and endeavour to shew, See. 3.
Wilf. 259.

1. In what cases they lie.
2. What ought to be the form of them.
3. In what courts they may be brought.
4. In what county.
5. Within what time.
6. Who are disabled to bring them.
7. Whether there may be a nonsuit in them.
8. Whether the informer or defendant may appear by attorney.
9. In what cases there shall be costs.
10. Whether the defendant may wage his law, or take advantage of a protection.
11. In what manner the defendant is to plead to such an information or action.
12. By whom the replication shall be made.
13. In what manner the issue shall be joined, and where it shall be tried.

14. Where the verdict may be found as to part of the information against the informer, and as to other part for him.

15. What judgment on such an information or action is good.

16. Whether the penalty of a penal statute may be compounded or granted over.

As to THE FIRST POINT, *viz.* In what cases an information or action *qui tam* will lie.

Sec. 17. I (a) take it for granted, that they lie on no statute which prohibits a thing as being an immediate offence against the public good in general, under a certain penalty, unless the whole or part of such penalty be expressly given to him who will sue for it; because (b) otherwise it goes to the king, and nothing can be demanded by the party.

When an act only gives a remedy to the party grieved, it is not to be considered as a penal statute.

B. R. H. 412.

(a) 2. Andr. 127. (b) 2. Andr. 128. 2. Jones 234. 1. Andr. 139, 140. Stra. 828.

(c) Co. Ent. 375, 376, 377. But where such statute gives any part of such penalty to him who will sue for it "by action or information, &c." I take it to be settled at this day, that any one may bring such action or information, and lay his demand (c) *tam pro domino rege quam pro seipso* (d).

1. Andr. 139,

140.

L. quin. Ed. 4. 117, 118. 3. Com. Dig. 518. (d) 4. Coke 13. 12. Coke 134.

Also where a statute prohibits, or commands a thing, the doing or omission whereof is an immediate damage to the party, and also highly concerns the peace, safety, or good government of the publick, or the honour of the king, or of his supreme courts of justice, as the statutes of the (e) scandal of great men; of (f) HUE AND CRY, and those that restrain certain suits in the (g) civil or canon law courts, or even in inferior (h) common law courts, it seems to have been the general opinion, that the party grieved may, and it is holden (i) by some, that he ought to, bring his action on such statute *tam pro domino rege quam pro seipso*. And it seems to be taken (k) as a ground in some books, that wherever the king is to have a fine on an action on a statute, the action must be so laid; but not where the defendant is only to be amerced. But I much question, whether this be a good general settled rule in relation to this matter; since in an action on the statutes of HUE

(e) 4. Co. 13.

12. Coke 134.

Hetley 122.

Qu. 1. Sid.

233.

1. Levinz 248.

(f) Rastal 406,

407.

Co. Ent. 348,

&c.

(g) Rastal 226.

Dimes 23, 24.

C. Jac. 134.

Dyer 159.

1. Roll. 203.

(h) Rastal 433.

(i) 4. Coke 13.

(k) C. Jac. 134. Hetley 121. Moor 911.

AND CRY, the defendant shall (a) only be amerced; and, (a) C. Jac. yet such action may certainly be laid *tam pro domino rege quam pro seipso*. 350.

Also in actions, which, by the common law, a man may bring *tam pro domino rege quam pro seipso*, as in those for injuries to the party, mixed with a high contempt to the king, (as where a (b) Judge refuses to allow the benefit of the king's pardon to a prisoner, unless he will give him such a bribe; or where one makes a (c) rescous of one taken on a *capias utlagatum*, at the suit of the party, or the sheriff suffers one taken on such a *capias* to (d) escape), the plaintiff is (e) said to have his election to lay his action this way, but not to be compelled so to do. To which may be added, that the plaintiff cannot so lay his action for a common trespass at common law, and yet therein the defendant is to be fined.

41. Affize 12. 27. Affize 49. (e) C. Jac. 679.

Neither does the opinion I would contend against, seem to be confirmed by the constant course of precedents; but on the contrary, many of those on the statutes against (f) forcible entries, and on the statutes against (g) illegal distresses, do not lay the action *tam pro domino rege quam pro seipso*; and yet there are (h) authorities in this last case, as well as in the former, that the defendant is liable to be fined. But the case of an (i) action on 2. & 3. Edw. 6. c. 13. wherein it seems clear that it is not necessary to lay the action *tam pro domino rege quam pro seipso*, does not seem to come up to the point; because it is generally holden, that the defendant is only amerciable in such action, being in nature of an action of debt, and not finable, as it is said (k) that he may be in an indictment or information grounded on the (l) contempt of the statute.

460. C. Car. 559. 460. (i) Moor 911. 2. R. Abr. 223. Cro. Eliz. 621. Hct. ley 121, 122. (k) Moor 911. C. Jac. 538. 631. (l) Savil. 62.

As to THE SECOND POINT, viz. What ought to be the form of such information or action.

SECT. 18. Having in the precedent chapter, section 92. endeavoured to shew, that there is no need that such information or action conclude *contra pacem*, and in section 95. whether it be necessary for them to conclude *in contemptum regis*; and in sect. 100. that they need not recite the statute whereon they are grounded; and in sections 101, 102, &c. what mis-recitals of a statute will be fatal; and in sect. 110. 111, &c. how far it is necessary to bring the

the case within the very words of the statute; and in sect. 116, 117. how far it is necessary to conclude *contra formam statuti*; and in sect. 115. in what cases one may have judgment on a statute, in an action brought at common law;

I shall in this place observe only these following particulars:

Sect. 19. FIRST, If an information contain several offences against a statute, and be well laid as to some of them but defective as to the rest, the informer may have judgment for so much as is well laid. (a) As where the words of the statute are fully pursued in the description of some of the offences and not of others; (b) or where some of the times that the defendant hath offended against the statute are expressed with convenient certainty, and others not; as where it is alledged that the defendant, for eleven months, and more, from the tenth of September in such a year, unto the ninth of September in the year following, used a trade without having been an apprentice, &c. or was absent from church, &c. in which cases judgment shall be given for the eleven months. But if the whole time be expressed inconsistently, as that the defendant was an offender eleven months, from the first of November in such a year to the first of August following, the whole is void for the repugnancy, as hath been more fully shewn, chap. 25. sect. 62.

(a) C. Jac. 104. But see *Rex v. Salamans*, 1. Term Rep. 249. where it is doubted whether a person can be convicted of two distinct offences in the same information.

(b) 1. Sid. 368.
1. Keble 366.
2. R. Abr. 696.
C. Jac. 529.
C. Eliz. 835.
Banbury 42. 63. Vide *Rex v. Taylor*, 1. Bac. Abr. 39. 41.

Sect. 20. SECONDLY, It seems to be settled at this day, that it is in the election of him who brings an action on a penal statute, which gives one moiety of the forfeiture to the king, and another to the informer, either to have a writ against the defendant, *quod reddat (c) domino regi et A. B. qui tam, &c. quas eis debet*; or to have it in this form, *quod reddat A. B. qui tam, &c. quas ei debet*.

(c) 1. Jones 261.
Cro. Car. 256
Flowden 77.
78.
Dyer 95. 3. Lev. 374, 375. Qu. Dalif. 66, 67. Moor 64, 65. B. Aft. fur le Stat. 4. 27. H. 8. 23.

(d) B. Aft. Pop. 5.
L. Quin. Ed. 4. 117.
See *Rastal* 686.
Vit. 1. 427, 428.

Also it seems to be settled, that whether the writ be in the one form or the other, it is well pursued by a declaration in the name of the plaintiff only (d).

Also it seems to be doubtful, whether there be any necessity that either the writ, or count, in any such action, do

do exprefs that it is brought by it for the king as well as the party, as hath been more fully fhewn in the feventeenth fection; and there is a (a) precedent for fuch an action brought in the king's name by A. B. *qui pro feipfo in hac parte fequitur*. (a) Raftal 427.

But it feems (b) agreed that every information muft be in this form, that the informer *tam pro domino rege quam pro feipfo fequitur*, even where it is brought on a ftatute which gives one third part of the penalty to a third perfon. (b) Jones 262, C. Car. 256, Coke's Ent. 371.

But I find fome difference as to the forms of fuch informations, as to fome other refpects; for fometimes they fay, (c) that the action accrues to the informer, *qui tam, &c.* to demand the fum forfeited for the king and himfelf; and (d) fometimes that it accrues to the king, and to the informer, *qui tam, &c.* and (e) fometimes, that it accrues to the king, and to J. S. &c. viz. where the ftatute divides the penalty into three parts, &c.) and alfo to the informer *qui tam, &c.* and fometimes they have no (f) claufe at all of this kind. (c) Co. Ent. 370. (d) Raftal 430, 431, 463. (e) Co. Ent. 369, 366, 365. Raftal 208. (f) Co. Ent. 371. 2. Keb. 820. 2. Modern 100. (f) Co. Ent. 370, 364.

And (g) *quare*, if it be not fatal to have any fuch claufe where the penalty is not recoverable by the information, but requires a fubfequent one, grounded on the conviction. (g) 1. Lutw. 161. Vide fup. B. 1. c. 8. feft. 10.

Alfo, fometimes fuch informations pray procefs againft the defendant, to bring him in to (h) answer to the informer, *qui tam, &c.* only; fometimes (i) to answer *tam domino regi quam* A. B. *qui tam, &c.* and (k) fometimes to answer *de et fuper præmiſſis* generally, without expreffing to whom. (b) Co. Ent. 364. (i) Co. Ent. 370, 369, 365, 366. (k) Co. Ent. 371, 372.

SecT. 21. THIRDLY, regularly it is fafeft for every fuch information or action to demand the very fum due to the informer, and neither more or lefs; for it hath been adjudged, (l) that if an action on a ftatute demand the whole forfeiture for the informer, where the ftatute gives part of it to the king, it is insufficient. (l) Bro. Aft. fur le Stat. 4. 27. H. 8. 23. Vide Hob. 245. Bull. N.P. 196.

Alfo it hath been holden, (m) that if the information make no demand at all, or demand more or lefs for the party than appears to be his due, it is insufficient as to him, yet (n) perhaps it may be good as to the ſhare of the forfeiture given to the king. (m) Hobart 245. Vide C. Car. 330, 331. (n) C. Car. 330, 331. Cunningham v. Bennet. Trin. 1. Geo. 1. C. B.

Alfo

(a) 1. Jones. Also it hath been (a) adjudged, that it is sufficient to demand the share due to the informer, without making any mention of that due to the king.
156, 157.

(b) 1. Jones. Also, (b) where the *quantum* of the forfeiture depends upon the finding of the jury, as it does on the *statute of Forfeiting*, it hath been adjudged sufficient to leave a *blank* (13) the blank, if for the sum.
156, 157.
(13) Q. As to the blank, if it would not be bad? 1. Bac. Abr. 38. *in notis*.

(c) B. Act. Also it hath been (c) adjudged, that a popular action may conclude "*ad grave damnum*," without adding, "of the plaintiff;" because every offence, for which such action is brought, is supposed to be a general grievance to every body.
Pop. 2.

Sect. 22. FOURTHLY, It is enacted by 18. Eliz. c. 5. sect. 1. "That none shall be admitted or received to pursue against any person or persons, upon any penal statute, but by way of information or original action, and not otherwise."

And it hath been adjudged that no popular action, since this statute, can be brought on a former statute, either by (d) bill in the king's bench, or by (e) plaint in an inferior court, but only by *original writ* or information; whether the statute on which such action is grounded (f) inflict a penalty generally, without saying how it shall be recovered, or expressly give a recovery by bill or plaint, &c.; as that of 4. & 5. Ph. & Mary against (g) making kerseys without having served an apprenticeship; and that of 5. Eliz. c. 4. against (h) following any other trade without having served an apprenticeship.

(d) C. Eliz.
76, 77.
Moore 247.
3. Inst. 194.
(e) C. Eliz.
544.
(f) 23. H. 6
10.
C. Eliz. 76,
77.
Moore 247.
390.

3. Inst. 194. (g) 4. & 5. P. & M. 5. f. 32, 33, 34. 6. Coke 19. Moore 412.
(h) 5. Eliz. 4. f. 31. 39. C. Eliz. 544. Noy 60.

(i) 1. K. Abr. Yet the contrary hath been since expressly adjudged (i) as to such former statutes as expressly give a recovery by bill or plaint, because the statute of 18. Eliz. c. 5. doth not mention *original writs*, but *original actions*; and a suit by bill or plaint is an (k) *original action* in the court in which it is commenced, and therefore may reasonably seem to be only within the intent of the statute, where it is removed into a superior court, and there proceeded upon. And if this be the meaning of the statute, (l) I see not how any suit
517.
(k) Vide 2. D.
Abr. 279, 282.
3. Leon. 237.
(l) In an action on the
21. Hen. 8. c.
23. f. 26. for non-residence it was objected that this was a proceeding *by bill*, whereas it should have been by *information* or *original* according to the statute 18. Eliz. c. 5. but the Court said that a proceeding *by bill* is an *original action* within the 18. Eliz. c. 5. and that "original" as there read does not mean "original writ" but "original action," as contradistinguished from proceedings in inferior courts and the Star Chamber, where the proceedings were in a summary way by libel or complaint. Leigh v. Kent, 3. Term Rep. 305.

whatever,

whatever, by bill or plaint on any penal statute, can be within the purview of it while such bill or plaint continue in the court in which they were commenced, whether the statute on which they are brought do expressly mention them, or leave the method of suing to the general construction of law. To which may be added, that the statute 21. Jac. 1. c. 4. sect. 1. seems to suppose, that actions on penal statutes may indifferently be brought by writ, plaint, bill, or information; for the words are, "That all offences hereafter to be committed against any penal statute, for which any common informer or promoter may lawfully ground any popular action, bill, plaint, suit, or information, before justices of assize, &c. shall be commenced, &c. by way of action, plaint, bill, information, or indictment in the proper county, before the justices of assize, &c."

However, it seems clear, (a) that no suit, by bill or plaint, by a party grieved, suing upon a clause either expressly or impliedly relating to himself only, is within the said statute of 18. Eliz. For it is expressly provided, sect. 6. "That it shall not restrain any certain person, body politick or corporate, to whom, or to whose use any forfeiture is limited by any statute; and not generally to any person that will sue; but that every such person may use as before." (b)

(a) C. Eliz.
434. 645.
Vide C. Eliz.
76. 77.
3. Leon. 237.
(b) C. Eliz.
76. 77.
3. Leon. 237.

But where the party particularly grieved by an offence against a statute sues for a forfeiture generally limited to any one who will sue for it, he seems to be as much within the restraint of the said statute, as if he were not the party grieved.

Sect. 23. FIFTHLY, (c) In an action on a statute, which requires some officers at one certain time after their admission, and others at another, to qualify themselves by certain acts, it is safest, expressly to shew the time when the defendant was admitted to his office, and that he neglected to qualify himself in the time limited; and also, that he actually exercised his office after such neglect.

(c) Lutw. 152.

Sect. 24. SIXTHLY, It is said (d) that the fact is sufficiently alledged after a *quod cum* in an action on a statute, but not in an information.

(d) Shower 337.

As to THE THIRD POINT, viz. In what courts such an information or action may be brought.

Señt. 25. Having already, c. 5. *señt. 33.* endeavoured to prove, that where a statute appoints that a penalty shall be recovered in any of the king's courts of record, the offence may be indicted before justices of *oyer and terminer*, though not in a court-leet, or of (a) pie-powder, or such others, instituted for special purposes; and intending under the next particular, incidentally to consider what suits may be brought in the courts of WESTMINSTER-HALL on penal statutes; I shall only take notice in this place, that where a statute limits suits by an informer *qui tam* to other courts, yet any (b) one may, by construction of law, exhibit an information in THE EXCHEQUER for the whole penalty for the use of the king.

Con. Hut. 99.
1. Jones 193.
Littleton 163.
C. Car. 112.
1. Ventris' 8.
(a) C. Eliz.
530.
6. Coke 20.

(b) 2. Andr.
127, 128.
C. Jac. 178,
179.
See Post. *señt.*
39.

As to THE FOURTH POINT, viz. In what county such information or action may be brought.

Señt. 26. It is enacted by 31. Eliz. c. 5. f. 5. "That in any declaration, or information, not being exhibited by such officers of record, as had in respect of their offices before the time of the said statute lawfully used to exhibit informations, or sue upon penal laws; and not (d) concerning champerty, buying of titles, or extorting, or the king's customs, &c. or usury or forestalling, &c. the offence against any penal statute shall not be laid to be done in any other county but where the matter alledged to be the offence was in truth done: And that the defendant may traverse, and alledge, that the offence supposed to be committed, was not committed in the county where it is alledged; which being tried for the defendant, or if the plaintiff be thereupon nonsuit, the plaintiff shall be barred in that action or information."

(d) Par. 4. B.
1. c. 80. *señt.*
47.
Law of Nisi
Prius 195.

(+) Farrer
qui tam v.
Williams,
Cowper 369.

Señt. 27. It is further enacted by 31. Eliz. c. 5. f. 7. "That all suits for using unlawful, or not using lawful games, or for not having bows or arrows, or for using a trade without having been brought up in it, (+) shall be sued and prosecuted in the general quarter-sessions of the peace, or assizes of the same county, where the offence shall be committed, or otherwise inquired of, heard and determined, in the assizes, or general quarter-sessions of the peace of the same county where such offence shall be committed, or in the leet within which it shall happen, and not in any wise out of the same county where such offence shall happen, or be committed."

In the construction of this statute the following particulars seem most remarkable:

Sec. 28. FIRST, That it hath been adjudged, that the defendant can have no advantage of the above-recited clause, which appoints, that all offences against penal statutes shall be laid in the proper counties but (a) only by way of plea; and this construction seems very agreeable to the purport of the said clause; the words whereof are, "That the defendant may traverse the county, &c. which being tried for him, or if the plaintiff be there—upon nonsuit, the plaintiff shall be barred, &c."—But this point is otherwise settled by 21. J. 1. c. 4. f. 3.

(a) 2. Andr. 180, the contrary adjudged. C. Eliz. 735, 736.

Sec. 29. SECONDLY, That the said clause extends (b) not to any suit by a party grieved, or by THE (c) ATTORNEY GENERAL, but only to those brought by common informers.

(b) C. Eliz. 645. (c) 1. Vent. 8. C. Jac. 178.

Sec. 30. THIRDLY, That the last recited clause, concerning suits for using a trade without having been brought up in it, &c. which are appointed to be brought at the assizes or sessions, in the proper county, and not in any wise out of the county, restrains not an information in the king's bench or exchequer, for such offence happening in the same county where those courts are sitting; for the negative words of the statute are not, that such suits should not be brought in any other court, but, that they shall not be brought in any other county; and the prerogative of these high courts shall not be restrained without express words (e).

(d) C. Jac. 178, 179. Salkeld 373. Hobart 184.

(e) See Hill v. Dechain,

Stiles 382. and Sparrow v. Urquhart, 2. Burr. 1042. that the jurisdiction of the superior courts may be ousted by *necessary implication* as well as *express words*, and therefore in the Case of *Cates qui tam v. Mellish*, on the statute 25. Geo. 3. c. 51. which creates penalties of *Fifty Pounds* and *Ten Pounds*, and enacts that the former shall be sued in any of the courts at Westminster, and provides that it should and might be lawful for justices of the peace, &c. to hear and determine the latter; the Court held that the provision ousted the superior courts of their jurisdiction as to the *Ten Pound* penalties, 3. Term Rep. 442.

But where the offence is in a different county, such suits, in those, or any other courts, out of the proper county, seem to be within the express (f) words of the statute: Yet it was long a very great (g) question, Whether an action of debt or information in the courts of *Westminster-hall*, were not to be construed to be out of the meaning of them: But this point is now settled in the construction of the statute of 21. Jac. 1. c. 4. as shall be more fully shewn hereafter.

(f) Vide Hob. 184. 327. C. Jac. 85. (g) 1. Keble 184. 2. Kebl. 99. 125. 3. Keble 247. 448. 1. Sid 303.

Sec. 400.

(a) Vide Hobart 251. & B. 1. c. 10. S. 5. Raymond 394.

Sec. 31. It is enacted by the said statute of 21. Jac. 1. c. 4. "That all offences to be committed against any penal statute, for which any common informer or promoter may lawfully ground any popular action, bill, plaint, suit, or information before justices of the assize, justices of *nisi prius* or gaol-delivery, justices of *oyer and terminer*, or justices of peace, in their general or quarter-sessions (except offences against the statutes concerning (a) recusancy, &c. or maintenance, &c. or the king's customs, &c. or transporting gold, or silver, or munition, or wool, or leather, &c.) shall be commenced, sued, prosecuted, tried, recovered and determined, by way of action, plaint, bill, information or indictment before the justices of assize, justices of *nisi prius*, justices of *oyer and terminer*, and justices of gaol-delivery, or before the justices of the peace of every county, city, borough or town corporate, and liberty, having power to inquire of, hear and determine the same, in *England* or *Wales*, wherein such offences shall be committed, in any of the courts, places of judicature, or liberties aforesaid, respectively, only at the choice of the parties who shall commence suit, or prosecute for the same, and not elsewhere, save only in the said counties, or places usual for those counties, or any of them: and that the like process in every popular action, bill, plaint, information or suit, to be commenced, sued or prosecuted, by force of, or according to the purport of this act, be had and awarded, to all intents and purposes, as in an action of trespass *vi et armis* at common law. And that all and all manner of informations, actions, bills, plaints, and suits whatsoever, to be commenced, sued, prosecuted, or awarded, either by THE ATTORNEY GENERAL, or by any officer whatsoever, or by any common informer, or other person whatsoever, in any of his majesty's courts at *Westminster*, for or concerning any of the offences aforesaid, shall be void."

Sec. 32. By 21. Jac. 1. c. 4. f. . it is further enacted, "That if on the general issue the offence be not proved in the same county in which it is laid, the defendant shall be found not guilty," as shall be more fully shewn under the eleventh particular.

Vide Cro. Car. 316.
4. Inst. 272.
2. Inst. 193.
Salkeld 367.
Ld. Ray. 426.
Carthew 503.

Sec. 33. And by 21. Jac. 1. c. 4. f. . "no officer shall receive, file, or enter of record, any information, bill, or plaint, count or declaration, grounded on the said penal statutes, or any of them, which by this act are appointed to be heard and determined in their proper counties, until the informer or relator hath first taken a
"cor-

“ corporal oath before some of the judges of that court, that
 “ the offence or offences laid in such information, &c. was
 “ or were not committed in any other county than where,
 “ by the said information, &c. the same is, or are supposed
 “ to have been committed, &c. the same oath to be there
 “ entered of record.”

In the construction of this statute I shall observe the following particulars :

SECT. 34. FIRST, That as the law is now (*a*) settled, no action of debt, or information, or other suit whatever, can be brought in any court of *Wesminster-hall*, on any penal statute made before the said statute of 21. Jac. c. 4. for any offence not therein excepted, for which the offender may be prosecuted in the country, (*b*) unless such offence shall be committed in the same county in which the court shall sit; and surely this cannot but be thought most agreeable to the meaning as well as the letter of the said statute; the whole provision whereof would be to little purpose, if such suits should be construed out of it. And as to the objection, that if all suits on penal statutes should be wholly taken from the superior courts, all offences against them would become dispensible by the offender's removing himself out of the county wherein he committed them, because the courts in the statute mentioned have no jurisdiction out of the counties wherein they sit, it hath been (*c*) answered, that process of outlawry will lie against such offenders, by virtue of the above-recited clause of the said statute, which gives the like process in all suits prosecuted according to the purport of it, as in actions of trespass at the common law.

Sup. sect. 35. Strange 415. (*c*) 1. Salkeld 373.

SECT. 35. SECONDLY, That (*d*) where a subsequent statute gives an action of debt, or any other remedy, for the recovery of a penalty in any court of record generally, it so far impliedly repeals the restraint of 21. Jac. c. 4. and consequently leaves the informer at his liberty to sue in the courts of *Wesminster-hall*.

SECT. 36. THIRDLY, That the statute of 21. Jac. c. 4. gave (*e*) no jurisdiction to the courts therein mentioned, over any offences, in relation to which they had none before; and (*f*) therefore that suits for such offences must be

Healey 101. 10. Jones 198. Hutton 98, 99. (*f*) C. Car. 112. Salkeld 371. Lit. Rep. 163. Hutton 98, 99. 2. Keble 106. Strange 1103. Andrews 27. 174. 298. 1. Vin. Ab. 203. 6. Viner 342.

brought in the courts of *Westminster-hall* in the same manner as before.

(a) 1. Jones *Sett.* 37. FOURTHLY, That (a) the said statute hinders not the removal of any indictment into the king's bench by *certiorari*; after which it may be either tried there, or in the country by *nisi prius*.
193.
Rex v. Martel,
Bull. N. P.
196.

† FIFTHLY, That a writ of error lies from the king's bench to the exchequer chamber in a *qui tam* action of debt.
Lloyd, v.
Skut,
Douglas 353. N. (91).

(b) C. Car. *Sett.* 38. SIXTHLY, That (b) an officer, by receiving an information without such a previous oath, that the offence arose in the same county in which it is laid, doth not make the proceedings upon it erroneous; for the act is only directory to the officer, but doth not intend that such oath should be made parcel of the record; and therefore the omission of it cannot be assigned for error; and yet the act is express, "that such oath shall be entered of record." But *quære*,
316.
Vide 4. Inf.
272.
1. Inf. 193.

(c) Vide Salk. If the Court may not properly be (c) moved to set aside such process, as having issued contrary to the directions of the statute? (†)
376.
Sup. sect. 10.

(†) This clause of the statute was thought to be *obsolete*, 1. Bac. Abr. 64. *notie*. But on a motion to stay proceedings in a penal action, because the plaintiff had not filed any affidavit, that the offence was committed within the county, or within a year before the action was brought, according to the direction of this statute, the Court held, that an act of parliament cannot be repealed by *non user*, and therefore stayed the filing of the declaration, *White v. Boot*, 2. Term Rep. 274. But in an action or information in the superior courts, the want of such an affidavit is not a sufficient ground to stay the proceedings on motion after verdict, *Leigh v. Kent*, 3. Term Rep. 362. or in any previous stage of the cause, *Balls v. Atwood*, 1. H. Black. Rep. 546. for that the statute 21. Jac. 1. c. 4. does not controul any of those penal statutes on which actions are to be brought in the superior courts, 3. Term Rep. 364. See *Andrews* 25.

(d) Cro. Eliz. *Sett.* 39. SEVENTHLY, That no (d) suit by a party grieved is within the restraint of the statute.
645.
Noy 71.
Shower 354. 3. Leonard 237.

† EIGHTHLY, That the statute 21. Jac. 1. c. 4. only restrains the proceedings on penal statutes in the superior courts, where the informer before the passing of that statute might have sued in the inferior as well as in the superior courts, "by action, bill, plaint, suit, or information;" and therefore if a previous statute give certain penalties to be recovered "by action of debt or
" in.

Shipman qui
tam v. Hen-
best, 4. Term
Rep. 109.

"information in the courts at *Westminster*;" and by a subsequent clause give jurisdiction to "the justices of assize, of gaol-delivery, and of the peace, to inquire of the premises, and to hear or determine the same," the inferior courts can only proceed by indictment or presentment; but the informer may bring an action of debt in the courts at *Westminster*.

As to THE FIFTH POINT, *viz.* Within what time such information or action may be brought.

Sec. 40. It is to be observed, that all popular actions were limited to a certain time by 7. Hen. 8. c. 3. But this (a) statute being repealed by 31. Eliz. c. 5. I shall take no farther notice of it.

(a) Vide B. Act. Pop. 6. Law of nisi prius 195.

Sec. 41. It is enacted by the said statute of 31. Eliz. c. 5. 4. Modern sect. 5. "That all actions, suits, bills, indictments, or informations which shall be brought for any forfeiture upon any statute penal, made, or to be made, whereby the forfeiture is or shall be limited to the queen, her heirs or successors only, shall be brought within two years after the offence committed; and not after two years. And that all actions, suits, bills, or informations, which shall be brought for any forfeiture, upon any penal statute, made, or to be made, except the statutes of tillage, the benefit and suit whereof is or shall be by the said statute limited to the queen, her heirs or successors, and to any other that shall prosecute in that behalf, shall be brought by any person that may lawfully sue for the same, within one year next after the offence committed; and in default of such pursuit, that then the same shall be brought for the queen's majesty, her heirs or successors, any time within the two years after that year ended. And if any action, suit, bill, indictment, or information, shall be brought after the time so limited, the same shall be void. And it is provided, that where a shorter time is limited by any penal statute, the prosecution must be within that time."

Sec. 42. By 18. Eliz. c. 5. f. 1. it is also enacted, "That upon every information which shall be exhibited on any penal statute, a special note shall be made of the very day, month, and year of the exhibiting thereof into any office, or to any officer, which lawfully may receive the same, without any antedate thereof to be made; and that the same information be accounted and taken to be of record from that day forward and not before: And that no process be sued out upon such

"information, until the information be exhibited in form
 "aforesaid, &c. and that every clerk making out process
 "contrary to this act shall forfeit forty shillings; &c."

Sec. 43. By 21. Jac. 1. c. 5. it is farther enacted,
 "That no officer shall receive, file, or enter of record,
 "any information, bill, plaint, count, or declaration,
 "(a) Cro. Car. grounded on any penal statute (being (a) within the
 316. provision of the said statute of 21. Jac. c. 4.) until the in-
 2. Inst. 192. former or relator hath first taken a corporal oath, be-
 4. Inst. 292. fore some of the judges of the court, that he be-
 Salkeld 376. lieves in his conscience, the offence was committed
 For this mat- "within a year before the information or suit, within
 ter see the "the county where the said information was commenced,
 38th sect. " &c."

In the construction of these statutes, I shall observe the following particulars.

(b) Hobart
 270.

4. Mod. 144.
 1. Shower 353.
 Bull. N. P.
 195.

Sec. 44. FIRST, That (b) if an offence prohibited by any penal statute be also an offence at common law, the prosecution of it, as of an offence at common law, is no way restrained by any of these statutes.

(c) 3. Bac.
 Abr. 505.
 Shower 353.
 354.
 Noy 71.

Sec. 45. SECONDLY, That if a suit on a penal statute be brought after the time limited, the defendant needs not plead the statute, but (c) may take advantage of it on the general issue.

(d) C. Car.
 331.
 C. Jac. 366.
 Vide Dalif. 60.
 3. Willf. 250.

Sec. 46. THIRDLY, That if an information *qui tam* be brought after the year on a penal statute, which gives one moiety to the informer, and the other to the king, it is naught only (d) as to the informer, but good for the king.

(e) Sup. f. 38.
 C. Eliz. 645.
 3. Leon. 237.
 Shower 354.
 Carthew 232.

Sec. 47. FOURTHLY, That the party grieved is (e) not within the restraint of these statutes, but may sue in the same manner as before.

Ld. Raymond 78. B. N. P. 195.

(f) Shower
 353, 354.

Sec. 48. FIFTHLY, That it seems not (f) to be settled, whether the suing of a *latitat* within the year be a sufficient commencement of a suit on a penal statute, to avoid the limitation of these statutes (14)?

(14) It has been determined that it is a sufficient commencement of the suit, Carthew 232. Shower 353. But if the writ were not sued out till after the year, though by relation it would be within the time, the plaintiff ought to be nonsuited, 3. Burrow 1243. Bull. N. P. 195. and the real day of suing out the writ, which shall be considered as the commencement of the suit, may be shewn in the pleadings, 3. Burrow 1243. But it must be sued out within one year next after "the offence committed," Lloyd *qui tam v. Williams*, 3. Willf. 250.

Sec.

Sec. 49. SIXTHLY, That it (a) seems also to be questionable, Whether a suit by a common informer on a penal statute, which first gives an action to the party grieved, and in his default, after a certain time, to any one who will sue, be within the restraint of these statutes? (a) Showes 353. Bull. N. P. 195. Vide Cowper 366.

Sec. 50. SEVENTHLY, That it seems questionable, Whether the clause in 31. Eliz. c. 5. f. 4. by which it is enacted, " That nothing in the said act contained shall extend to champerty, king's customs, or forestalling, &c. " but that every such offence may be laid in any county, " any thing in the said act to the contrary notwithstanding, " do except the said offences out of the above-recited clause relating to the time within which suits on penal statutes must be brought? For the words above-mentioned, viz. " but that every such offence may be laid in any county, " seem to restrain the generality of the precedent, which say, " that nothing in the act contained shall extend to such " offences."

As to THE SIXTH POINT, viz. What persons are disabled to bring such an information or action.

Sec. 51. It is enacted by 31. Eliz. c. 5. f. 1. " That no " person, other than the party grieved, shall be received to " inform, or sue upon any penal statute, that before that " time hath been for any misdemeanor, by any order of any " the queen's majesty's courts, ordered not to follow or pursue any suit upon any penal statute."

† And it hath been adjudged, that neither an infant; nor a corporation can sue as a common informer. Strange 1241.

As to THE SEVENTH POINT, viz. Whether there may be a nonsuit in such an information or action.

Sec. 52. It seems agreed, that notwithstanding the king (b) cannot be nonsuit in any information or action wherein he himself is the sole plaintiff, yet any (c) informer *qui tam*, or (d) plaintiff in a popular action, may be nonsuit, and hereby wholly (e) determine the suit as well in respect of the king as of himself. (b) Co. Lit. 139. F. Nonf. 13. B. Nonf. 68. Prerog. 116. (c) Co. Lit. 139.

B. Nonf. 68. Prerog. 116. (d) B. Nonf. 35. (e) 37. H. 6. 5. B. Nonf. 35. See *Moulton qui tam v. Bingham*, 2. Term Rep 511. *notis.* The statute of 14. Geo. 2. c. 17. for judgment as in the case of a nonsuit does not extend to an information *qui tam* for the King and party, Parker 92.

(a) Lit. 139. Also it seems agreed, (a) that THE ATTORNEY-GENERAL
Burrow 72. may enter a *nolle prosequi* (which, as (b) some say, has the
220. effect of a nonsuit) to any information or action brought by
(b) Coke Lit. the king only.
239.
Vide 1. Sid.
420. Qu. Salkeld 21. 2. Lord Raymond 1039.

As to THE EIGHTH POINT, viz. Whether the informer or defendant may appear by attorney.

(c) B. Att. Sect. 53. It seems agreed, that after (c) plea pleaded on an
53, 54. 63. indictment, information, or action, for any crime whatsoever,
101. under the degree of (d) capital, the defendant might always,
9. Edw. 4. 2. by the favour of the Court, be permitted to appear by attorney.
9. Edw. 4. 4. Also it seems, that generally the Court might always
22. Affize 73. dispense with the personal appearance of the defendant, even
(d) B. Att. before (e) plea pleaded, (f) except in such cases wherein a
63. personal appearance is required by some statute, as it is in (g)
(e) Dyer 346. *præmunire*, &c. in which cases it seems generally agreed,
9. that an appearance by attorney cannot be admitted without
1. Levinz 146. some special writ or grant to that purpose, whether the de-
Vide 21. Edw. fendant be a peer (b) or commoner. It is said indeed, in
4. 77. (f) F. Att. 48. *Rolls Reports*, that Sir (i) Anthony Mildmay was suffered to
53. 104. plead a pardon to a *præmunire* by attorney, and no mention
3. Inst. 125. is made of any such writ or grant. But I presume that
39. Edw. 3. 7. there was a clause to this effect in his pardon.
15. H. 7. 9.
F. N. B. 66.
Vide B. Att. 69. 81, 82. 37. H. 6. 27. 3. H. 7. 6. C. Jac. 462. 616. 22. Edw. 4.
33, 34. (g) See cases letter d. (b) 15. H. 7. 9. 39. Edw. 3. 7. (i) 1. Roll 190.
2. Bulstrode 299.

Now an infor- Sect. 54. By 18. Eliz. c. 5. f. 1. it is enacted, " That
mer shall sue. " every informer, upon any penal statute shall exhibit his
" suit in proper person, and pursue the same only by him-
" self, or by his attorney in court (16); and that he shall
" not use any deputy or deputies at all."

(16) Therefore an infant cannot be a common informer, for he must sue by guar-
dian, *Maggs v. Ellis* M. 25. Geo. 2. and he cannot be an attorney, because he can-
not be sworn, March 92.

In what cases Sect. 55. By 29. Eliz. c. 5. f. 21. it is recited, " That
the informer divers of her majesty's subjects, dwelling in the remote parts
may appear of the realm, had been many times maliciously troubled
by attorney. upon informations and suits exhibited in the courts of the
king's bench, common pleas, and exchequer, upon penal sta-
tutes, and had been drawn up upon process out of the coun-
tries where they dwell, and driven to attend and put in bail,
to their great trouble and undoing :"—For reformation
thereof

thereof it is enacted, " That if any person or persons shall
 " be sued or informed against, upon any penal law, in any
 " the said courts, where such person or persons are bailable
 " by law, or where, by the leave or favour of the Court,
 " such person or persons may appear by attorney, in every
 " such case, the person or persons so to be impleaded or
 " sued, shall and may, at the day and time contained in
 " the first process served for his appearance, appear by at-
 " torney of the same court where the process is returnable,
 " to answer and defend the same, and not be urged to per-
 " sonal appearance, or to put in bail for the answering such
 " suits."

Sect. 56. By 31. Eliz. c. 10. s. 20. it is enacted, " That
 " this shall extend only to the natural subjects born, or to
 " be born, within the dominions of the queen's majesty, her
 " heirs or successors, and to persons made free denizens, and
 " to no others." Does not ex-
tends to alien
informers.

As to THE NINTH POINT, *viz.* In what cases there shall
 be costs, on such an action or information.

I shall endeavour to shew,

1. Whether *an informer* shall, in any case, have his
 costs ;

2. In what cases *the defendant* shall have them.

As to the first of these particulars, *viz.* Whether an in-
 former shall in any case have his costs :

Sect. 57. I take it to be in a great measure settled, (a) (a) 2. Keble
 that *an informer* upon a popular statute, shall in no case 781.
 whatsoever have his costs, unless they be expressly given him 1. R. Abr.
 by such statute; for it is certain that he cannot recover 574-
 them by the common law, for that doth not (b) give costs 1. Lutwyche
 in any case. 200.
 1. Ventris 133.
 Salkeld 206.

Moor 65. 3. Levinz 374. (b) 2. Inst. 288. Gilbert's C. P. 258.

Neither can he recover them by the *statute of Gloucester* (c), (c) 6. Edw. 1.
 which gives the demandant his costs in all cases wherein he c. 1.
 shall recover his damages; for this seems to suppose some
 damages to have been done to the demandant in particular,
 which cannot be said in any popular action; and therefore
 such actions have always been construed to be out of the
 benefit of this statute.

(a) 1. Keble
781.
1. R. Abr.
516, 517. 574.
1. Jones 447.
C. Car. 559.
1. Lutwyche
200.
2. Inst. 289.
Carthew 230.
Skin. 363.
367. Holt 172. 12. Modern 46. Comb. 224.

But it seems agreed, (a) that an action on a statute, by the party grieved, for a certain penalty given by such statute, is within the *statute of Gloucester*, because such penalty is intended him by way of recompence for his particular damage by the offence prohibited; and if he could recover that only, and no more, by way of costs, it would be in most cases in vain for him to sue for it, since the costs of suit would exceed it.

b) 1. R. Abr.
574.
1. Lutwyche
20.
10. Coke 16.
C. Car. 560.

But it is said, that no costs shall be recovered in an action on a statute which gives no certain penalty to the party grieved, but only his damages in general, &c. if such a statute be introductive of a new law, and give a remedy in a (b) point not remediable at the common law. But there is not that inconvenience in this case as in the former; because no certain sum being specified, the jury may give the plaintiff a full satisfaction by way of damages.

Witham v.
Hill, 2. Willf.
91.

† But it hath been adjudged, that in an action brought against a hundred on the statute 1. Geo. 1. c. 5. f. 6. to recover damages for injuries committed by rioters, the plaintiff is entitled to costs.

Jackson v.
Calefworth,
1. Term Rep.
71.

† Also that a party grieved suing the hundred on the statute 9. Geo. 1. c. 22. for setting fire to the plaintiff's house, is entitled to costs, although they together with the damages exceed the sum limited in the statute.

1. Black. Rep.
1157.
4. Burr. 1229.
Bull. N. 1'.
197.
Hullock on Costs 200.

† Also that on a *bona fide* composition of a penal action by leave of the Court, the plaintiff may be allowed a reasonable sum for his costs; and that on motion the defendant may pay the penalty into court with costs.

Hullock on
Costs 203.

† Also that if a plaintiff in an action on a popular statute obtain a verdict, and the judgment is arrested for a defect in the pleadings, he shall not have costs.

As to the second particular, *viz.* In what cases the defendant shall have costs.

Stat. 58. It is enacted by 18. Eliz. c. 5. which is made perpetual by 27. Eliz. c. 10. " That if any informer, or plaintiff, on a penal statute shall willingly delay his suit, or shall discontinue, or be nonsuit in the same, or shall have the trial or matter passed against him therein, by verdict or judgment of law, that then, in every such case, the same informer or plaintiff shall yield, satisfy, and pay unto the party defendant his costs, charges, and damages,

" to be assigned by the Court in which the same fact shall be attempted, &c."

In the construction hereof, I shall take notice of the following particulars.

SECT. 59. FIRST, That it seems to be agreed, that no action on any statute by the party (a) grieved, is within the purview of this statute, the whole purport whereof seems clearly to relate only to common informers: Yet if such action, by the party grieved, be " for any offence or wrong (b) personal, immediately supposed to be done to the plaintiff or plaintiffs;" or, whatsoever the nature of the action may be, if the plaintiff (c) might have costs, in case judgment should be given for him, he shall pay them on a nonsuit or verdict against him, &c. by virtue of (d) 23. Hen. 8. c. 15. and (e) 4. Jac. 1. c. 3.

Lord Raymond 27. Savil 50. 1. Burr. 402. 1723. Bac. Abr. 522.

SECT. 60. SECONDLY, That it hath been holden, that where judgment is given against an informer because the Court in which he (f) sues has no jurisdiction of the cause, or (g) because the statute on which he grounds his information is discontinued, yet he shall pay costs within the intent of the said statute of 18. Eliz. c. 5. which shall have a liberal construction, and was intended to prevent all vexatious informations; and surely such ill-grounded prosecutions cannot but be thought such.

Qu. Hurt. 35, 36. Vide Cowper 367. Bunbury 72.

† THIRDLY, That in an information, if the prosecutor does not go on to trial, especially after notice and without its being countermanded, the defendant shall have his costs.

† FOURTHLY, That if to an information on 8. Geo. 1. c. 19. for killing game, the defendant plead a conviction before a justice for the same fact, and has judgment for want of a replication, he shall have his costs.

† FIFTHLY, That a *qui tam* informer is liable to costs on 18. Eliz. c. 5. as well as an informer suing for the whole penalty upon a nonsuit on an action of debt on the 21. Hen. 8. c. 13. f. 26. for non residence, though part of the penalty is limited to the king.

SIXTHLY,

Barnes 124.

† SIXTHLY, That if the defendant obtain a verdict in a *qui tam* action of debt on the 5. Eliz. c. 4. for exercising a trade contrary to that statute, he is entitled to costs.

Town of Dover v. Hodgson, 1. Willf. 39.

† SEVENTHLY, That where a defendant obtains a verdict in a *qui tam* information he shall have costs, although he himself removed the information from the sessions into the court of king's bench.

Elde qui tam v. Stephens, 1. Ld. Raym. 1353.

† EIGHTHLY, That if it appear upon the record that the plaintiff is a common informer, the Court will not, after a verdict for the defendant, receive an affidavit that the suit was really prosecuted for the benefit of another person, in order thereby to exempt the nominal plaintiff from costs under 18. Eliz. c. 5.

English qui tam v. Cox, Cowp. 322.

† NINTHLY, That the Court will not stay proceedings in a *qui tam* action until the costs of a *non pros* in a former action by a different plaintiff against the same defendant be paid.

1. Stra. 697.
1. Willf. 266.
Real v. Mackey, 1. Stra. 1406.
Shindler v. Roberts, Bull. N. P. 197.
Cowp. 24.

† TENTHLY, That the Court will stay the proceedings in a *qui tam* action when the plaintiff resides abroad, until he give security to pay costs, or, as it is said in one case, where the plaintiff is a *foreigner*, though resident in England; and that if a prosecution upon a penal statute be brought in a *feigned name*, the Court will oblige the real prosecutor to give security for cost; but that they will not insist on such security merely on account of the *poverty* of a plaintiff.

Parker qui tam v. Macfarlan, 3. Term Rep. 137.

† ELEVENTHLY, That if the Court see reason to suspect that a *qui tam* action is prosecuted merely for the issue money, they will on motion permit it to be paid into court to abide the event of the suit.

As to THE TENTH POINT, *viz.* Whether the defendant, in such an action or information, may *wage his law*, or take advantage of a *protection*.

(a) 10. H. 7.
18.
Br. Ley ege, 63. 106.
Co. Lit. 295.

SECT. 61. It is said (a) to have been ruled, that the defendant ought not to be admitted to *wage his law* in any such action or information, because they are founded on a statute; nor do I find any authority to the contrary. But perhaps it may be questioned, how far the reason given for the opinion abovementioned may be conclusive, since such an action or information doth not seem so (b) properly to be grounded on a statute, as on the contempt of it.

(b) Vide 11. H. 7. 16.

But

But as to the question, Whether the defendant can take advantage of a *protection*? there seems to be near the same number of authorities on each (a) side. But there is no great need nicely to examine these matters, since generally it is expressly provided by penal statutes, that neither *wager of law*, nor *protection*, shall be admitted in any suit brought upon them.

(a) In the affirmative, F. Protect. 68. 122. Keilway 135. In the negative,

F. Protection 61. 105. 21. Edw. 3. 13. Coke Lit. 131. Vide 2. R. Abr. 323.

As to THE ELEVENTH POINT, viz. In what manner the defendant is to plead to such an information or action.

Sett. 62. I shall take it for granted, that he must answer to the whole (b) time laid in such information or action; and that if he have any (c) special matter for his excuse or justification, he must set it forth (19) with all convenient certainty; and that if he plead the *general issue* to the whole, he must depend upon it, and not (d) together with it plead also a *special plea* either to the whole or part of the charge.

(19) For a *qui tam* information cannot be quashed on motion, Strange 953. except for defect of jurisdiction, Rex v. Williams,

1. Burr. 385. and see 4. Com. Dig. "Information" (D 4.) (b) Bridg. 115. (c) Vide Bridg. 114, 115. (d) 1. Roll. 49, 50. 134. A defendant cannot plead double in *qui tam*, Strange 1044. Barn. K. B. 17, for the statute of 4. Ann c. 16. which allows double pleading does not extend to penal actions, Heyrick v. Foster, 4. Term Rep. 701.

† And it hath been adjudged, that although the statute 4. Term Rep. 21. Jac. 1. c. 4. f. 4. enables the defendant to plead the general issue, and to give the special matter in evidence, yet he cannot avail himself under such plea of any matter which goes to the jurisdiction of the Court.

But for these matters I shall refer the Reader to the Books which treat of pleading in general: Vide 1. Com. Dig. 227, to 232.

And in this place shall only consider,

1. Where a prior suit depending may be pleaded to such an information or action.

2. Where a pardon, or release, or a recovery in a former suit may be pleaded to such action or information.

3. What is a good general issue; and where it may be pleaded.

As

As to THE FIRST particular, *viz.* Where a prior suit depending may be pleaded to such an information or action :

(a) C. Eliz. 241. 1. Roll. 49. 134. (b) Doug. 240. *Secf.* 63. It seems agreed, (a) that wherever any suit on a penal statute may be said to be actually depending, (b) it may be pleaded in abatement of a subsequent prosecution, being expressly averred to be for the same offence.

(c) C. Eliz. 61. 1. Roll. 49; 50. Neither (c) will it be any exception to such a plea, that the offence in the subsequent prosecution is laid on a day different from that in the former.

(d) Hobart 209. Neither (d) doth a mistake in such a plea of the very day whereon the suit pleaded as prior was commenced, seem to be material on the issue of *nul tiel record*, if it appear in truth to have been commenced before the other, and for the same matter.

(e) Hobart 138. And if two informations be exhibited on the very same day, it seems (e) that they may mutually abate one another, because there is no priority to attach the right of the suit in one informer more than in the other.

(f) C. Eliz. 241. (g) 10. Ed. 4. 13. Scra. 137. 701. Bull. N. P. 157. (b) C. Eliz. 677. C. Jac. 11. 5. Coke 48. 1. Roll. 376. Con. Salk. 89. Harrelley 5. 2. Edw. 4. 11. 7. Coke 30. 1. Bac. Abr. 41. (20) The day of suing forth the writ is the commencement of the suit, 3. Burrow 1423. Also it seems, that an (f) information or bill (g) the same day that they are filed, may be so far said to be depending, before any process sued upon them, that they may be pleaded in abatement of any other suit on the same statute. And from the same reason it seems also, that a writ of debt may be so pleaded after it is returned ; because then it seems to be agreed, that it may properly be said to be depending ; and whether it may not also be so pleaded before it be returned, seems questionable ; because, according to some (b) opinions, a writ may be said to be depending as soon as purchased (20).

As to THE SECOND particular, *viz.* Where a pardon, or release, or a recovery in a former suit, may be pleaded to such an information or action.

Secf. 64. It seems agreed, that notwithstanding the king have such an interest in every penal statute, that he may (i) 11. Co. 65, (i) proceed in a suit brought upon it by a common informer, after the death, release, or nonsuit of such informer, 5. Coke 48. Noy 100. 3. Inst. 194. 2. Bull. 261, 262. C. Eliz. 583. Moor 541. Con. C. Eliz. 138. 37. H. 6. 5. 20. B. Attaint 130. Vide 2. Roll. 33. Hutton 82.

hanging the prosecution; and may also totally prevent any such suit, by first (d) suing for the whole penalty himself; or may totally bar it by a pardon or release (b) precedent to its commencement; yet if it be actually commenced before any suit by the king, the informer hath such an interest in the part of the penalty assigned him by the statute, that the king can no (c) way discharge, or suspend the suit, as to (d) such part.

1. H. 7. 3. 37. H. 6. 4. 3. Inst. 194. 5. Edw. 4. 2. 3. (c) C. Eliz. 128.
1. Leonard 119. 1. H. 7. 3. 37. H. 6. 4. Hutton 82. B. A&T. Popham 3; 4.
3. Inst. 194. (d) Savil 23.

(a) Crom. Jurif. 38.
3. Inst. 194.
11. Coke 65, 66.
(b) F. Dec. tant. 5. Character 21.
B. A&T. Pop. 3, 4.

Also it seems that the king can in (c) no case bar the suit (c) Noy 100. of a party grieved, nor proceed in it after the death of the plaintiff, &c. Moor 58.

Also it seems agreed, (f) that a conviction or acquittal *bona fide* in any action or information on a penal statute, whether by the party grieved, or a common informer, or a release *bona fide* from the party grieved, or common informer, (g) after such a conviction, hath always been a good bar of any subsequent prosecution for the same offence.

9. Edw. 4. 4. (g) 2. Roll. 33. B. A&T. Popham 7. 5. Ed. 4. 2, 3.

(f) F. Dec. tant. 4, 5.
B. A&T. Popham 4. 7.
C. Jac. 486, 487, 482.
1. H. 7. 3.
11. Coke 65, 66.

But for the better settling of these matters, the statute of 4. Hen. 7. c. 20. was made, by which is recited, "That it had been usual for offenders against penal statutes to cause popular actions to be commenced against them by covin of the plaintiffs, or else when such actions had been commenced against them, to delay the same either by non-appearance, or by traverse and hanging the same, to cause the like action popular to be brought against them by covin for the same cause and offence, and therein by covin of the plaintiff to be condemned, either by confession, feigned trial, or release, which condemnation or release, so had by collusion and covin, did use to bar the plaintiff in the action sued in good faith; and thereupon it is enacted, "That if "any person sue with good faith any action popular in "bar of the said action; or else, that he before that "time barred the plaintiff in any such action popular, that "then such plaintiff, with good faith, may aver, that such "recovery or bar were by covin; and if such collusion or "covin so averred, be lawfully found, such plaintiff shall "recover, &c. and the defendant condemned of covin or "collusion, as aforesaid, shall have two years imprisonment, " &c. and that no release of any common person to any such "party, whether before or after any action popular, or "indictment of the same, had, or commenced, or made, hanging the said action, shall be any wise available or effectual to "let

No recovery on an information shall be had by collusion.

"let or surcease the said action, indictment, process, or execution." Provided always, "That no plaintiff or plaintiffs be received to aver any covin in any action popular, where the point of the same action, or else the covin or collusion, have been once tried, or lawfully found with the plaintiff or plaintiffs, or against them, by trial of twelve men, and not otherwise."

(a) Plowd.
49, § 2.

Sec. 65. It is (a) said, that if a recovery in a former suit be pleaded in bar of any popular action, the plaintiff may, by reason of the express words of the statute, aver, that such recovery was by covin, without shewing wherein the covin consisted (21). But otherwise such a general pleading would be vicious.

(21) But the plea must state that the plaintiff in the other action had priority of suit, or, on demurrer, it will be bad. *Jackson v. Giffing*, Trin. 15. Geo. 2. *Str.* 1169, 2. *Levinz* 141. *Burrow* 1433. *Black.* 437.—The record of the former recovery cannot be given in evidence upon *nil debet*; it must be specially pleaded; and then the plaintiff may reply *nil tuel record*, or that it was a recovery by fraud to defeat a real prosecutor; which the plaintiff could not be prepared to shew upon the general issue. *Breden qui tam v. Harman*, *Strange* 701.

As to THE THIRD particular, *viz.* What is a good general issue, and where it may be pleaded.

I shall observe the following particulars.

Sec. 66. FIRST, That if the defendant plead *nil debet* to an action or information *qui tam*, it is safest to say that he owes (b) nothing to the informer, nor to the king; because if he only plead, that he owes nothing to the informer, it may be objected, (c) that the whole declaration is not answered, which makes a demand for the king as well as the informer: Yet perhaps it may be a good answer (d) to such objection, that in the plea that he owes nothing to the informer, it is necessarily implied that he owes nothing to the king, and therefore needs not be expressed.

(e) 21. H. 6. *Sec. 67.* SECONDLY, That if there be more than one defendant, they ought (e) not to plead jointly, that they are not guilty, but severally, that neither they, nor any of them, are guilty, &c.

20.
F. Deci. tant.
6.
2. R. Abr. 707.
Full. N. P. 197.

Sec. 68. THIRDLY, That wherever the breach of the statute, whereon such suit is grounded, is alledged only from a matter *in pais*, and not from matter of record, the defendant may plead, that he *owes nothing*, or that he is not guilty,

guilty, &c. (a) but if it be alledged from a matter of record, (a) 21. H. 7. such a plea is not good; because a record is not triable by the country, but only by itself. 14. Bro. Issues joind, 23. and

see the case of Coppin qui tam v. Carter, where "not guilty" was pleaded to an action of debt on a penal statute, and held not such a nullity as warrants judgment to be signed for want of a plea; and the Court was inclined to think that this is a good plea, 1. Term Rep. 462. Vide 21. Jac. 14. par. 4.

Se^{ct}. 69. FOURTHLY, That if the defendant be within the benefit of any proviso of a penal statute, he might, according to some, always give it in (b) evidence on the general issue, in a suit on such statute: But if he have matter in his discharge depending on a subsequent statute, it hath been holden (c) even since the statute of 21. Jac. 1. c. 4. that he must plead it specially, and cannot give it in evidence. But this seems contrary to the express purview of the said statute; by which it is enacted, "That if any suit shall be brought against any person for any offence against any penal law, either by, or on the behalf of the king, or by any other, or on the behalf of the king and any other, it shall be lawful for such defendant to plead the general issue that he is *not guilty*, or that he *owes nothing*, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded, had been sufficient in law to have discharged the said defendant against the said suit, and the said matter shall be then as available, to all intents and purposes, as if it had been sufficiently pleaded in bar." (d) 2. R. Abr. 683. Con. pl. 11, (e) 2. R. Abr. 683. 1. Bac. Abr. 870 edit. 68.

Se^{ct}. 70. Also it is enacted by the same statute, par. 2. "That if the defendant to any suit, commenced by, or on the behalf of the king or any other, for any offence against any penal statute, plead, that he *oweth nothing*, or, that he is *not guilty*, and the plaintiff or informer, upon evidence to the jury, shall not prove the offence laid in the said suit, and that the same offence was committed in the same county in which it is laid, the defendant shall be found not guilty."

Se^{ct}. 71. It is provided by the last paragraph of the said statute, "That no clause thereof shall extend to any suit on any law against popish recusants, &c. or against champerty, &c. or concerning defrauding the king of his custom, &c. or the transporting of gold, or silver, or munition, &c. or wool, or leather, but that such offence may be laid in any county, at the pleasure of the informer." Vide sup. f. 50.

But *quære*, if the last words of this proviso, *viz.* "but that such offence may be laid in any county," do not restrain the exception intended by it to that part of the statute only which relates to the laying the offence in the proper county? For if so, the defendant in a suit on the laws mentioned in it, may give the special matter in evidence on the general issue, as well as in a suit on any other penal statute.

As to THE TWELFTH POINT, *viz.* By whom the replication is to be made in such an information or action.

Sett. 72. It seems agreed, (a) that regularly a replication to a special plea to an information in the courts of *Westminster-hall*, shall be made by the attorney-general only, who, in respect of the king's interest in the suit, is presumed to be most proper to be consulted concerning it; and by the same reason it (b) seems, that such replication in a suit before justices of assize, shall be made by the clerk of the assizes only. Also it is said, (c) that the replication to a general issue in an information *qui tam* in the courts of king's bench or exchequer, may be made in the name of the attorney-general only, by the usage of those courts. But in most of the (d) precedents I can find of actions *qui tam*, the replication is made by the plaintiff only. Also I find a demurrer by the informer only to a plea in bar to an (e) information *qui tam*, without any mention of the attorney-general. And if the ATTORNEY-GENERAL, &c. shall absolutely refuse to make a replication to any plea to an information, surely the informer may be (f) admitted to make it himself; for otherwise it would be in the power of THE ATTORNEY-GENERAL, &c. by refusing to make a replication, wholly to defeat the suit (22)

(a) 6. Coke 30.
Cro. Jac. 538.
C. Eliz. 138.
2. Roll. 33.
B. Attaint 127.
Co. Ent. 365, 366, 367, 368, 395.
Rastal 410.
(b) C. Jac. 102.
(c) 1. Andr. 49.
(d) Co. Ent. 159, 163, 165, 166, 167.
(e) Co. Ent. 371.
(f) Sup. f. 64.
5. Coke 48.

(22) If the plaintiff reply in the exchequer the defendant shall rejoin in four days, or judgment *nil dictu* shall be entered—and if the plaintiff demur, the defendant shall join in six days, or judgment shall be entered as aforesaid. 4. Com. Dig. "Information" (D) 6.

As to THE THIRTEENTH POINT, *viz.* In what manner the issue is to be joined in such an information or action, and where it shall be tried.

Sett. 73. It had been laid down (g) as a settled rule, that where the king is to have no part of the thing demanded in an action on a penal statute, but only a fine or amercement, there is no necessity, either in the joining of the issue or *venire facias*, to use the words *qui tam pro domino rege, &c.* but that it is sufficient simply to name the party, as in actions at

(g) C. Car. 336.
Co. Ent. 160, 161, 164, 348, 350.
Respecting the imparlance & pleading in an information, vide 3. Com. Dig. 514.

at common law; for the king seems to have little more interest in such suits than in actions at law. Yet wherever the plaintiff may declare *tam pro domino rege quam pro seipso*, it seems (a), that it can be no fault to use those words as well in the joining of the issue, &c. as in the beginning of the suit. And if the king be to have part of the penalty demanded, it hath been (b) adjudged to be a fatal fault, and not amendable after verdict, not to mention that the plaintiff sues *tam pro domino rege quam pro seipso* in the joining of the issue. But *quære*; for there are many (c) precedents where the issues in such actions have not mentioned the plaintiff as suing for the king, but have simply named him by his proper name, as in other actions; and where he is expressly named in the declaration as suing for the king as well as for himself, why should it be intended that he sues otherwise in the progress of the action (23).

(a) Rastal 406, 407.
Co. Ent. 349.
(b) 1. Vent. 122.
2. Keble 788.
Sup. f. 17. 20.
(c) Co. Ent. 159. 163. 165, 166, 167.
Sup. f. 17. 20.
(23) Vide the usual form of pleading in this case, 1. Bac. Abr. Actionis qui tam (D).

As to the place where such issues shall be tried.

SECT. 74. It is enacted by 18. Eliz. c. 5. "That no jury shall be compelled to appear in any of the queen's courts at *Westminster*, for the trial of any issue in any suit (by a common (d) informer) upon any penal law, for any offence committed above thirty miles from the city of *Westminster*, except in case where THE ATTORNEY-GENERAL for the time being, for some reasonable cause in that behalf to be shewed, shall require the same to be tried at THE BAR, in any of the courts of the queen's majesty, her heirs or successors, at *Westminster* aforesaid; which request shall be noted on the backside of the writ of *distingas* thereupon awarded, to the end the sheriff, or his bailiff, may, and shall signify the same to the jury that are in such case impanelled."

(d) See the three last sections of the statute; & the 22d, 27th, & 49th sections of this chapter.

† And by 24. Geo. 2. c. 18. f. 3. "Every *venire facias* for the trial of any issue, in any action or information upon any penal statute in any of the courts of record at *Westminster*, counties palatine of *Lancaster*, *Chester*, and *Durham*, and the principality of *Wales*, shall be awarded of the body of the proper county where such issue is triable."

Strange 1085.
Andrews 67.

AS TO THE FOURTEENTH POINT, viz. Where a verdict may be found as to part against the informer, and as to part for him.

(e) 2. R. Abr. 707, 708.
Lanc. 19. 59.

SECT. 75. It seems (e) that regularly, if an offence against a statute be of such a nature that it may be committed by a single person, without the concurrence of any other, and

b. Vide Rex v. Hale, Cowper 723.

several persons be jointly charged in one information for one act done by them all against such statute, one of them only may be found guilty, and the rest acquitted; because, though the words of the information seem to import a joint charge against all the defendants, yet, in judgment of law, each of them is charged severally for his own offence, which cannot but be several, whether the act, in the doing whereof it consisted, were done by one or more; and accordingly the issue must be, (a) that neither they, nor any of them, are guilty. And for the like reasons, if one be informed against for having offended against a statute for more times, or in a higher degree than can be proved, as for not coming to church during the space of ten months, where he can be proved to have been absent but eight months, &c. or for (b) ingrossing a thousand quarters of wheat, where the evidence amounts but to seven hundred, he may be found *guilty* so far as the evidence goes, and *not guilty* for the residue; for such offences are not in the nature of entire contracts, which regularly must be fully proved in the same manner as they are alledged, but are in the nature of trespasses, which it is sufficient to prove for any part. But if the offence against a statute consist in making a contract contrary to the purview of it, as in the case of usury, it is (c) said, that if it be alledged as having been made by two, it must be so proved likewise, because it is a rule of law, that if contracts be not proved as they are laid, they shall not be taken to be the same (24).

(24) Where an offence, made penal by statute, is, in its nature *single*, one single penalty only can be recovered, though several join in committing it. But if the offence be in its nature several, each offender is separately liable to the penalty. *Rex v. Clark*, Cowper 610.

As to THE FIFTEENTH POINT, *viz.* What judgment on such an information or action is good.

Sect. 76. It hath been adjudged, that where a statute, as that of recusancy, for instance, ordains that the offender shall forfeit such a sum, and that the sum so forfeited shall be divided into three parts, whereof one-third shall go to the king, and one to the informer, and the other to the poor, &c. and that if the offender do not pay, &c. within such a time, he shall be committed, &c. the judgment on an information *qui tam* on such statute may be general, that the (d) king and the informer shall recover the whole (e) sum, without making any mention how it shall be distributed, or that the party shall be committed (f) for non-payment, &c.

Lut. 159. 162.
5. Mod. 431.
Cro. Car. 504.
Co. Ent. 362.
Salkeld 383.
(d) 1. Andr.
139, 140.
Vide Style
329, 330.
(e) 2. R.
Abr. 102.
Vide 2. Keble
820.
(f) 1. Andr.
139, 140.

But

But on such an information, if the judgment for the recovery of the forfeiture be given wholly for the informer, without any mention of the king, it hath been holden; (a) *Style 329, 330.* that it is totally erroneous.

Yet it hath been adjudged, that if on an information *qui tam*, wherein, as it is laid, the informer hath no right to any part, but the king ought to have the whole, judgment be given that the defendant shall forfeit the sum mentioned by the statute, and that the king shall have one moiety, and the informer the other, such judgment is erroneous (b) *(b) 1. And. 123, 129, 130.* only as to the latter part, wherein it awards to whom the penalty shall go; but shall stand for the clause concerning the forfeiture, which sufficiently entitles the king to the whole.

And it hath been adjudged, (c) that if there be no clause at all concerning the forfeiture in a conviction on a penal statute, but only a judgment *quod convictus est*, it is sufficient, for the forfeiture is implied. *(c) Rex v. Hawkins, M. 3. Geo. 1.*

† Also that wherever the act expresses the amount of the penalty, or leaves it to the discretion of the magistrate, there must be a judgment of forfeiture as well as a conviction (d). *(d) Stra. 858. 2. Burr. 1163.* † But where the act, as the 9. Ann. c. 14. says, "That the offender shall forfeit five times the value, &c." all the judgment the Court can give is *quod convictus est*, and a new action must be brought upon that judgment for the forfeiture (e). *(e) Stra. 1048, 50.*

† Also that one who is convicted on a penal statute cannot be apprehended on a *Sunday* for non-payment of the forfeiture (f). *(f) 1. Term Rep. 265.*

† Also that judgment on a *qui tam* action may be entered either jointly or severally; for the whole penalty or for the distinct moiety; but that the more regular way is to enter it jointly for the whole. *Hart qui tam v. Hawkins, 1. Black. Rep. 373.*

† It hath also been adjudged, that a judgment in a popular action may be affirmed as to one part, and reversed as to the other; as where damages and costs were given on 9. Ann. c. 14. it was reversed as to the damages and costs, and affirmed as to the debt. *Frederick v. Lookup, 4. Burr. 2018.*

† Also it hath been adjudged, that if the jury find a verdict for the plaintiffs generally in a penal action, and the plaintiff apply it to one count, he cannot afterwards apply it to another, though the former is bad in law, and though the evidence would have warranted the verdict on any other count. *Holloway qui tam v. Bennett, 3. Term Rep. 443.*

As to THE SIXTEENTH POINT, *viz.* Whether the penalty of a penal statute may be compounded or granted over.

4. Com. 135.
Strange 167.
1. Will. 79.
130.
4. Burr. 1929.
An indictment on a popular statute cannot be compounded after conviction, *Berry qui tam v. Levy, Black. 443.*

Sec. 77. It is enacted by 18. Eliz. c. 5. "That no informer, or plaintiff, shall or may compound or agree with any person or persons, that shall offend, or that shall be furnished to offend against any penal statute, for an offence committed or pretended to be committed, but after answer made in court unto the information or suit in that behalf exhibited or prosecuted; nor after answer, but by the order or consent of the Court in which the same information or suit shall be depending; on pain that whoever shall offend, in making of composition, or other misdemeanour, contrary to the true intent and meaning of this statute, or shall by colour or pretence of process, or without process, upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward, for himself or to the use of any other, without order or consent of some of her majesty's courts at Westminster, and shall be thereof convicted, shall stand on the pillory, &c. and for ever be disabled to pursue or be plaintiff or informer in any suit or information upon any statute popular or penal; and shall also forfeit ten pounds, &c."

(a) Law of *qui tam* 196.
See the three last sections of the statute, and the 22d, 47th, and 49th sections of this chapter.

Sec. 78. It seems (a) clear, both from the preamble and the whole tenor of the statute, that it extends only to suits by common informers, and not to those by a party *grieved*.

Wilkinson v. Allot, Cow p. 366.

† It is also decided that this statute extends to *qui tam* informers as well as to those who sue for the whole penalty.

(b) Hutton 35.

Sec. 79. But it hath been (b) holden, that it extends as well to subsequent penal statutes, as to those which were in being when it was made.

(c) 1. Keb. 106.
1. Siderfin 311.

And also it extends (c) to the compounding of suits commenced in courts which have no jurisdiction, as much as if they had a jurisdiction.

(d) 7. Co. 36.
57.
Moor 763.
H. bart 183.
3. Inst. 186, 187.

Sec. 80. It is enacted and declared by 21. Jac. 1. c. 3. (which as to these matters appears both by the preamble and body of the statute, and many former (d) resolutions, to be made in affirmance of the common law). "That all commissions, grants, licences, charters, and letters patents,

2. R. Abr. 187. seems con.

"made

“ made or to be made to any person or persons, bodies
 “ politick or corporate whatsoever, of power, liberty, or
 “ faculty, to dispense with any others, or to give licence
 “ or toleration, to do, use, or exercise any thing against the
 “ tenor or purport of any law or statute, or to give or make
 “ any warrant for any such dispensation, licence, or toleration
 “ to be had or made, or to agree, or compound with any
 “ others for any penalty or forfeitures limited by any sta-
 “ tute, or of any grant or promise of the benefit, profit,
 “ or commodity of any forfeiture, penalty, or sum of mo-
 “ ney, that is or shall be due by any statute, before judg-
 “ ment thereupon had; and all proclamations, &c. any
 “ way tending to the furthering of the same, are altogether
 “ contrary to the laws of this realm, and shall be utterly
 “ void, &c.”—And it is farther enacted, “ That all such
 “ commissions, &c. shall be examined, heard, tried, and
 “ determined by and according to the common laws of
 “ this realm, and not otherwise.”

Sec. 81. But it is provided, “ That this act shall not
 “ extend to any warrant or privy seal, made or directed by
 “ the king to the justices of either bench, or the exchequer,
 “ or of assize, or of *oyer and terminer* and gaol-delivery,
 “ or peace, or other justices for the time being, having
 “ power to hear and determine offences done against any
 “ penal statute, to compound for the forfeitures of any
 “ penal statutes, depending in suit and question before them,
 “ or any of them respectively, after plea pleaded by the de-
 “ fendant.”

Sec. 82. It is said by *Sir (a) Edward Coke*, that such justices, by such warrant, &c. can make such composition for the use of the king only. However it seems, that by the eighteenth of *Elizabeth*, they may give leave to an in-
 former to (b) compound with a defendant after plea pleaded.

(a) 3. Inst. 178.

(b) Vide supra
 f. 64, 65, 66.
 Black. 444.

† *Sec. 83.* It is a rule of the court of king's bench that where leave is given to compound, the king's half of the composition shall be paid into the hands of the master of the crown office for the king's use.

4. Burr. 1929.

† *Sec. 84.* It hath been decided, that the giving leave to compound is merely discretionary; and leave has been given to a defendant to compound after a verdict for the plaintiff.

1. Stra. 167.
 1. Will. 79.
 130.

Maughan p.
 Walker, 5. Term Rep. 98.

† *Sec. 85.* It hath also been decided, that if a defendant obtain a rule to stay proceedings, upon payment of a sum agreed upon between him and the plaintiff, the Court will enforce the payment of that sum by attachment.

5. Term Rep.
 257.

Sec. 86. Also it is provided, " That the said act shall
" not extend to any grants, letters patents, or commission
" heretofore granted, of, for, or concerning the licensing
" of the keeping of any tavern or taverns, or selling, ut-
" tering, or retailing of wines to be drunk, or spent in the
" mansion^d house or houses, or other place, in the tenure
" or occupation of the party or parties, or selling or utter-
" ing the same; or for or concerning the making of any
" compositions for such licences, so as the benefit of such
" compositions be reserved and applied to and for the use of
" his majesty, his heirs or successors, and not to the private
" use of any other person or persons."

CHAPTER THE TWENTY-SEVENTH,

OF PROCESS.

AND now I am come to such process as is to be awarded upon an APPEAL, an INDICTMENT, or an INFORMATION.

For the better understanding the nature whereof (having premised that it seems plain, from the nature of the thing, that there can be (a) no need of it where the defendant is present in court, but only where he is absent), I shall consider it, (a) Lamb. 4. c. 8.
Dalton 123,
Crompt. 150.

1. In general; without any particular regard to process of outlawry.

2. In particular; with regard to such process only.

And I shall examine the nature of such process in general, without any particular regard to process of outlawry, under the following particulars;

1. Where it is well awarded into a county different from that wherein the Court sits from which it is awarded.

2. What kind of process shall issue on an indictment, appeal, and information.

3. In what manner it is to be executed.

4. What is required by statute, in relation to process on informations.

5. What is the proper process on a default.

6. What after a removal by *certiorari*.

7. Where it shall be said to be discontinued, or discontinued, or put without day.

8. How far an error in process is fatal.

As to THE FIRST POINT, viz. Where such process is well awarded into a county different from that wherein the court sits from which it is awarded.

(a) 19. Affize 6. *Secf. 1.* It seems (a) to be a good general rule, that no process without writ can be well awarded on any indictment or appeal, &c. from any court out of the county wherein it sits.

(b) 8. F. C. 146. *But* it seems agreed, (b) that such process by writ may, by the common law, be well awarded into any county of England, either by the court of king's bench or by justices of eyre, upon an indictment, &c. before them.

Also it is clear, that justices of *oyer and terminer* have the same power, in relation to persons indicted or appealed before them of felony by force of 5. Edw. 3. c. 11. whereby it is recited, "That in times past, some persons appealed or indicted of divers felonies in one county, or outlawed in the same county, had been dwelling, or received in another county, whereby such felonious persons indicted and outlawed had been encouraged in their mischief, because they might not be attached in another county;" and thereupon it is enacted, "That justices assigned to hear and determine such felonies, shall direct their writs to all the counties of *England*, where need shall be to take such persons indicted."

Secf. 2. It is observable, that the mischief complained of in the preamble of this statute relates as well to persons appealed, as to those who are indicted: and therefore it seems reasonable to construe them also to be within the meaning of the purview, though they be not within the letter of it, which extends only to persons indicted.

(c) *Crompt.* 149. *Lamb. b. 4.* *d. 8.* *(d) Vide sup. c. 8. f. 33.* *Secf. 3.* It seems questionable, (c) Whether justices of peace, being assigned (d) by their commission to hear and determine felonies, are as well within the meaning as the letter of this statute? For as on the one side it may be urged, that this being a remedial law, ought to receive as favourable and large an interpretation as the words will admit, so on the other side it may be said, that the preamble of the statute making mention as well of persons appealed, as of those who are indicted, cannot be thought to have any manner of regard to justices of the peace, before whom no appeal lies; and nothing can be more reasonable than to construe one part of a statute by another.

Sec. 4. But by 22. Hen. 8. c. 5. f. 5. "Justices of peace of the shire, &c. wherein any decayed bridge shall be, &c. shall make process into every shire within this realm, against any persons who ought to amend such bridge, being presented before them to be decayed, &c."

Also they have the like power by other statutes in many other cases; for which, not being so proper for this treatise, I shall refer the reader to the Authors which more particularly treat of the OFFICE OF A JUSTICE OF PEACE (a). Dalton c. 392. 4. Burn 46. Crom. 152. Lamb. b. 4. s. 8.

(a) By the commission of the peace justices in sessions have power to make and continue process upon indictments found before them, until the persons indicted are taken, surrendered, or outlawed, 4. Burn. 48.

As to THE SECOND POINT, viz. What kind of process shall issue on an Appeal, Indictment, and Information.

I shall endeavour to shew,

1. Where such process ought to have the clause of *non omittas*.

2. In whose name, and under what *teste* it is to be made.

3. What is the proper process on indictments for crimes of an inferior nature.

4. What is the proper process on informations.

5. What is the proper process on appeals, and on indictments of treason, felony, and mayhem.

6. How many days there ought to be between the *teste* and return of such process.

As to the first particular, viz. Where such process ought to have the clause of *non omittas*.

Sec. 5. It is laid (b) down in some books as a general rule, that in every suit, to which the king is a party, the process ought to have the clause *non omittas propter aliquam libertatem, &c.* (b) Crom. 143. Lamb. b. 4. c. 8. Dalton c. 131. 41. Affize 17. B. Franc. 18.

Process 102. F. Prerog. 21. 1. Hale 577. 2. Hale 202. Vide infra f. 17.

Sec. 7.

Sec. 6. But I do not find this rule observed as to all kinds of suits by the king, in the best precedents. For though the said clause is mentioned in every award of process on (a) indictments (except only (b) one) and even on (c) informations *qui tam*, in *Coke's Entries*, yet it is omitted in all awards of process I can find on informations of (d) intrusion on the king's lands, or of (e) *trover* and *conversion* of his goods; and yet these are at least as much, if not more properly, the suits of the king, than the former.

(a) *Coke's Ent.* 352. to 363.

(b) *Ibid.* 358.

(c) *Ibid.* 365.

(d) *Ibid.* 368.

(e) *Ibid.* 372.

376. 379.

381. 387.

3. *Coke* 16, 17. (e) *Coke's Ent.* 390.

As to the second particular, *viz.* In whose name, and under what *teste* such process is to be made.

(f) *Vide*
4. *Inst.* 205.

Sec. 7. It is expressly (f) enacted by 27. Hen 8. c. 24. f. 3. "That all manner of process upon indictment of treason, felony, or trespass, to be made in every county palatine, and other liberty, shall be made only in the name of the king; and that every such person having such county palatine, or any other such liberty, to make process, &c. shall make the *teste* in the name of the person that hath such county-palatine, &c."

(g) *Vide* *Lam.*
b. 4. c. 8.

Dalton c. 132.

(b) *Finch* 436.

c. *Car.* 393.

2. *Hale* 199.

(c) *Lamb.* b.

4. c. 8.

See 1. *alt.* c.

132.

(k) *Crompt.*

132.

(l) *See* the

printed pre-

cedents in the

end of his

Eirenarcha.

(m) *B. Peace*

b. 7.

Vide 14. H.

2. b. b.

Crompt. 151.

(n) *Vide* *sup.*

c. 8. f. 24. 25.

Dalton c. 132.

Sec. 8. And as to process on indictments in any other courts, there can be no (g) doubt but that it ought also to be in the name of the king. And if it issue from the court of king's bench, it (b) seems clear, that it ought to be under the *teste* of the chief justice, or of the senior judge of the court, if there be no chief justice: And if it issue from any other court, there seems to be the same reason that it ought to be under the *teste* of the first in the commission; and that such a *teste* will be sufficient. It is holden indeed by (i) *Lambard*, that every process on an indictment before justices of peace, ought to be under the *teste* of some two justices: But there are precedents to the contrary in (k) *Crompton*; and even in (l) *Lambard*. Neither do the (m) authorities cited by *Lambard* seem to come up fully to his point; for they seem to amount to no more than this, that one justice of the peace cannot award process on an indictment, but that two of them at the least must do it, and that sitting the court in the sessions: And indeed it seems plainly to appear, from the (n) commission itself, that one justice has no authority either to take an indictment, or to proceed upon it: But I do not see the consequence, that because an indictment cannot be taken, or proceeded upon, by less than two, therefore the process cannot be *tested* by less than two.

As to the third particular, *viz.* What is the proper process on indictment for crimes of an inferior nature.

Seft. 9. It seems clear, both from the (a) books which speak of this matter, and the constant course of (b) proceedings, that a *venire facias* (which is but in nature of a summons to cause the party to appear) is a proper process to be first awarded on an (c) indictment for any crime, whether against the common law or statute, under the degree of treason, felony, or (d) mayhem, except in such cases wherein other (e) process is directed by some statute. Also such a *venire* seems to be the first proper process on an information in the crown office, for a debt claimed by the king, as having been forfeited by a *felo de se*.

Seft. 10. If it appear by the (g) return to such *venire*, that the party has lands in the county whereby he may be distrained, the (h) distress infinite shall be awarded from time to time, until he do appear, and by force hereof he shall (i) forfeit on every default so much as the sheriff shall return upon him in issues. But if a *nihil* be returned on such a *venire*, a (k) *capias*, *alias* and *pluries*, shall issue, &c.

Finch 352, 353. Dalt. Sh. c. 34. 78. Dalt. c. 132. (i) V. *anv.* Abr. 296. f. 5. 2. Inf. 453, 454. (k) Lamb. b. 4. c. 8. Crom. 150, 2. Trespas 232. Dalt. c. 132. 11. H. 6. 4. Finch 352.

Seft. 11. It is said in *Fitzherbert's* (l) *Abridgements*, (l) F. Process 188. "That in *oyer* and *terminer*, if the party at the first day make default, a man may have a *venire facias*, or a *pone per vadios*, &c. at his election;" the meaning whereof perhaps may be this, that if the defendant, being summoned on the *venire*, do not appear, the prosecutor may either take out a second *venire*, or a (m) *pone per vadios*, &c. But I cannot (n) find any express authority, or precedent, to justify the making either a *pone per vadios*, &c. or a *capias*, the first process on any indictment under the degree of mayhem, or felony, &c. except only where such process is expressly given by some statute.

As to the fourth particular, *viz.* What is the proper process on informations.

Seft. 12. It seems, that a *capias* against a (o) commoner, (o) Co. Ent. 372. 367. 373. and a (p) *disfringas* against a peer, are the first proper processes on an information for an intrusion on the king's lands, or for a (q) *trover* and conversion of his goods: And either an *attachment* (r) or *subpœna*, (s) at the election of the (q) Co. Ent. 397. (r) Co. Ent. 390. (s) Co. Ent. 370, 371. 395. Ander. 47. infor-

(c) Co. Ent. 159, 244, 266. informer, were by the common law proper processes on all informations *qui tam* on popular statutes. And so was a Rastal 599.
 (b) Finch 359. (a) summons in all originals in debt on such statutes, in the same manner as in an action of debt at (b) common law; and an (c) attachment, or *pone per vadios*, &c. in other actions on such statutes, in the same manner as in actions upon the Rastal 406.
 (d) Finch 355. case, and in actions of trespass at (d) common law.

Sett. 13. And it is enacted by 21. Jac. 1. c. 4. by which all popular suits on penal statutes are restrained to their proper counties, as is shewn at large in the preceding (e) chapter of Informations, "that the like process in every popular (e) Vide 2. 26. 1. 35, 10 39.
 (f) See Finch 345, 352, 455. "action, bill, plaint, information, or suit to be commenced, (f) 1. R. Abr. 453, 780, 793. "sued, or prosecuted, by force of, or according to the pur- port of the said act, be had and awarded, to all intents and purposes, as in an action of trespass *vi et armis* at the "common law." And (f) consequently the process in all such suits must now be by attachment, or *pone per vadios*, &c. and after by *distress infinite*, where by the return the party appears to be sufficient, (g) otherwise by *capias*.
 Palmer 449.
 1. Keble 159.
 2. R. Abr. 377.

Sett. 14. It is, as I take it, the usual practice of THE CLERK OF THE PEACE-OFFICE, on a criminal information, first, to award a *subpoena*; and after the return thereof, if no appearance be entered in four days, and an affidavit be made of the service of the *subpoena*, to make out a *capias* of course, where the defendants are informed against in their private capacity, and a (b) *distingas*, where they are sued as a corporation aggregate.
 (b) Vide Salk. 374.

As to the fifth particular, *viz.* What is the proper process on appeals, and on indictments of treason, felony, and mayhem.

Sett. 15. It seems certain, that a *capias* is the first process in all indictments of (i) treason or felony, and in (k) all appeals whether of mayhem or of felony; from whence it seems reasonable to conclude, that it ought also to be the first process in an indictment of mayhem, as well as of felony or treason.
 (i) 3. Mod. 265.
 2. Hale 194.
 (k) Co. Ent. 50.
 F. Exigent 28.
 Finch 346, 351. Rastal 45. there is a precedent seemingly contrary.

As to the sixth particular, *viz.* How many days there must be between the *teste* and return of all such process.

Sett. 16. It seems agreed, that there ought to be at least fifteen days between the *teste* and return of every process awarded

awarded from the king's bench into any (a) foreign county. (a) Co. Lit. 124. But that this is not required in process awarded into the same county wherein the court sits. Salkeld 124. 3. Salkeld 376. 1. Lev. 62. 9. Coke 118.

As to THE THIRD POINT, viz. In what manner such process is to be executed.

Sec. 17. It is laid down as a (b) general rule, that wherever the king is a party to the suit, as he certainly is to all informations and indictments, the process ought to be executed by the sheriff himself, and not by the bailiff of any franchise, (c) whether it have the clause *non omittas*, &c. or not, and whether the defendant be within a franchise, or in the county at large; for the king's prerogative shall be preferred to any franchise: But it is said, (d) that this is to be intended only where, in the grant of the franchise, no mention is made of causes to which the king is a party. (b) Dalt. c. 132. B. Franch. 18. Hale 577. 2. Hale 302. (c) 41. Affize 77. B. Process 102. F. Prerog. 21. (d) B. Prerog. 109. Franch. 31.

By 29. Car. 2. c. 7. s. 6. all process, &c. served on the Lord's day, except in "*treason, felony, and breach of the peace*," is void.

As to THE FOURTH POINT, viz. What is required by statute in relation to process on informations.

Sec. 18. It is enacted by 4. and 5. Will. and Mary, c. 18. "That no process shall issue on any information to be exhibited by the master of the crown-office, till the prosecutor has given such a (e) recognizance, as by the said act is directed." Also it is enacted by 18. Eliz. c. 5. "That (f) no process shall issue on any information on a penal statute, till a special note be made of the time when such information was exhibited, &c." — But these matters having been already handled in the chapter of Informations in the places cited in the margin, I shall refer the reader thither, for the fuller consideration of them. (e) Sup. c. 26. s. 5, 6, 10. (f) Sup. c. 26. s. 40, 41, 42. 44, 45, 46, 47.

As to THE FIFTH POINT, viz. What is the proper process upon a default.

Sec. 19. It seems, that if a defendant appear to an (g) indictment or (h) appeal of felony, and afterwards, before issue joined, make an escape, whether from his (i) bail, or from an actual (k) prison, the common *capias*, *alias*, and *pluries*, &c. shall be awarded against him, unless there had been an *exigent* before, in which case a new (l) *exigent* shall be immediately awarded. And if the defendant, against whom no *exigent* had been before awarded, make such default after issue joined, and an inquest awarded, to try it, it seems (m) (g) Sum. 216. 2. Hale 201, 202. (h) 16. Affize 13. 26. Affize 51. (i) 16. Affize 13. F. Exig. 10. Qu. Cramp. 150. (k) 25. Affize 51. 2. Hale 224. (l) 19. H. 8. 1. B. Process 1. seems contrary. (m) S. P. C. 70. B. Waiver de Chof. 39. F. Exig. 10. Process 113. 127.

that

(a) S. P. C. 70. that a *capias*, &c. shall be awarded against him *ad audiendum* F. Exig. 10. *juratum*, &c. and as I take it, the same day on which the Corone 173. *capias* is returnable, shall be given to the inquest; for it seems B. Waiver de Chofes 39. (a) agreed, that the inquest shall never be taken by default 26. Affize 13. in the case of felony, as it may for an inferior crime. B. Appeal 54.

But in such case, if *the exigent* had before been awarded, it (b) (b) 26. Aff. 51. seems that a new *exigent* in the common form shall be awarded; S. P. C. 70. and that thereby both the issue and inquest are without Summary 211. day. And it is said in some (c) books, that such *exigent* B. Waiver de Chofes 39. shall be *ad audiendum judicium*: But this seems questionable; F. Exigent 10. since it seems to be (d) agreed, that the defendant may save Corone 196. himself from judgment by a render at any time before the (c) 26. Affize return of the *exigent*. 51. Crompton 150. F. Corone 196. (d) F. Exig. 10. B. Waiver de Chofes 39. Corone 192. Summary 211.

(e) Sum. 211. Sect. 20. It is said (e) by Sir Matthew Hale, that the de- 2. Hale 225. fendant in such case appearing on *the exigent*, shall plead *de novo*, because the issue and inquest are *sine die* by the award of *the exigent*; but this seems to be made a *quære* by (f) (f) S. P. C. 70. Staundforde; and the (g) authorities whereon it seems to be (g) F. Exig. 10. chiefly founded, are very obscure, and as it seems may well 26. Affize 13. be understood in this (b) sense, that the Court may cause (b) F. Cor. 173. the same inquest to come to try the same issue, which, according to (i) Brook, though it be put *without day* by *the* (i) B. Waiver de Chofes 39. *exigent*, is not waived by it, unless the defendant fail to ren- B. Process 148. der himself before the return of it. B. Exigent 67.

CHAPTER THE TWENTY-SEVENTH.

CONTINUED.

OF PROCESS

BY

CERTIORARI.

BEFORE I proceed to THE SIXTH POINT, viz. What is the proper process to be awarded after a removal by *certiorari*, it may not be improper to premise some things concerning the nature of a CERTIORARI.

2. Hale 270

to 216.

2. Com. Dig.

16.

1. As to what courts a writ of *certiorari* lies.
2. Where the court of king's bench uses a discretionary power in granting, denying, and filing a *certiorari*.
3. What restraints are put upon a *certiorari* by statute.
4. How the *fiat* for a *certiorari* is to be signed.
5. To whom a *certiorari* ought to be directed.
6. Where a record may be removed into the court of king's bench without a *certiorari*.
7. What is to be done by a defendant before the allowance of a *certiorari*.
8. How far a *certiorari* is a *superfedeas* to the court below.
9. In what manner a *certiorari* is to be returned.
10. Where a record is removed by a *certiorari*.
11. What is to be done by the court above, where the record is not removed.

As to THE FIRST POINT, *viz.* To what courts a *certiorari* lies: I shall endeavour to shew,

1. Whether a *certiorari* lies to all inferior courts in general.
2. Whether to those of THE CINQUE-PORTS.
3. Whether to those of *Wales*.
4. Whether to those of *London*.

As to THE FIRST PARTICULAR, *viz.* Whether regularly a *certiorari* lies to all inferior courts in general.

Long's Case, C. Eliz. 48. *Secd.* 22. It seems agreed at this day, that regularly the court of king's bench having a general (a) superintendency over all other courts of criminal jurisdiction, whether they be of an ancient or (b) newly created jurisdiction, may award a *certiorari* as well as the court of chancery, to remove the proceedings before any such courts, unless the statute or (c) charter which erects them expressly give them an absolute judicature, exempt from such superintendency; as the (d) statutes concerning the commissioners of the *Cambridgeshire Fens*, &c. are said, by some, to have done:

1. *Long's Case*, C. Eliz. 48.
 2. *Carthew* 494. 501.
 3. *S. P. C.* 70.
 4. *Ld. Raymond* 216. 469.
 5. *Comyns* 76.
 6. *12. Mod.* 386.
 7. *643.* 145.
 8. *7. Mod.* 138.
 9. *Salkeld* 79.
 10. *Modern* 446.
 11. *Cro. Eliz.* 489.
 12. *Burrow* 1040.
 13. *1. Black.* 233.
 14. *1. Salkeld* 148.
 15. *2. Lev.* 86.
 16. *1. Burrow* 349.
 17. *1. Lev.* 312.
 18. *Con.* 41.
 19. *Affize* 22.
 20. *Ld. Raym.* 836.
 21. *B. Cor.* 193.
 22. *Certiorari* 8.
 23. *(b) 1. Salkeld* 144.
 24. *Lord Raymond* 580. 148.
 25. *(c) C. Car.* 295.
 26. *3. Modern* 93, 94.
 27. *(d) 1. Siderfin* 296.
 28. *Con.* 1.
 29. *Keble* 43.
 30. *2. Keble* 722.

Secd. 23. And accordingly it seems to be agreed, that such a *certiorari* lies to (e) *justices in eyre*; to justices of (f) *gaol-delivery*; to the court of a (g) *county-palatine*; and to the (h) *college of physicians*, having a special power by statute to fine and imprison for certain offences; to justices of peace, &c. even in such (i) *cases* which they are impowered by statute finally to hear and determine; and also to (k) *commissioners of sewers*, notwithstanding the clause in 13. Eliz. c. 9. f. 5. "that the said commissioners shall not be compelled to make any certificate or return of their commissions, or of their ordinances, laws, or doings, &c.;" or it hath been adjudged, (l) that this is intended

(e) 1. *Sid.* 216.
 2. *Keble* 81, 82.
 3. *Modern* 145.
 4. *Inst.* 294, 295.
 5. *(f) 1. Salk.* 144.
 6. *10. Modern* 178.
 7. *Farrelly* 128.
 8. *(g) 3. Mod.* 219, 230. 836.
 9. *Ld. Raym.* 836.
 10. *Cowper* 749.
 11. *2. Lev.* 223.
 12. *1. Salkeld* 146. 148.
 13. *1. R. Abr.* 395.
 14. *Aleya* 49.
 15. *Farrelly* 138.
 16. *12. Modern* 197.
 17. *1. Hale* 153.
 18. *Douglas* 723.
 19. *5. & 6. W. & M. c. 11. f. 5.*
 20. *(h) Comyn* 76.
 21. *Carthew* 194. 421. 491.
 22. *1. Salk.* 44. 396.
 23. *(i) 3. Modern* 93, 94.
 24. *(k) 1. Salkeld* 145.
 25. *Strange* 609.
 26. *Fort.* 374.
 27. *Ld. Raym.* 469.
 28. *8. Modern* 331.
 29. *1. Keble* 129.
 30. *March* 196, 197. 199.
 31. *Raymond* 186.
 32. *(l) 1. Modern* 44, 45.
 33. *Ld. Raymond* 469.
 34. *Douglas* 534.
 35. *1. Ven.* 67.
 36. *1. Levinz* 288.
 37. *Raymond* 186.
 38. *C. Jac.* 336.
 39. *Bunb.* 61.
 40. *Strange* 1263.
 41. *Burrow* 1042.
 42. *1. Lev.* 288.
 43. *2. Ven.* 66, 67, 68.

to exempt them from returning their orders into chancery, as by the statute of 23. Hen. 8. c. 5. they were obliged to do, and shall not be construed to take away the superintendency of the court of king's bench, without express words.

† It lies also to remove a presentment in a court-leet; and when removed, the presentment is traversable (a); to remove examinations taken before justices of the peace in pursuance of the 2. & 3. Ph. & M. c. 10. (b); to a jurisdiction created by a private act of parliament (c); to remove proceedings before commissioners of bankrupts (d); to remove proceedings in an action from the courts of the counties palatine (e); to remove an information before justices of assize against a parson for non-residence (f); to remove an indictment for not doing statute labour on the highway (g), or for not repairing a bridge (h); to the quarter-sessions of a corporation (i). So also to remove proceedings before two justices (k); as orders of conviction on the conventicle act, 22. Car. 2. c. 1. (l); an order on an appeal from scavengers rate (m); an order of bastardy if applied for in six months (n). So also it lies to remove an inquisition taken by the sheriff under a private act of parliament, and the verdict and judgment thereon (o).

(a) Cowp. 458.
Ante 76.
(b) Rex v. Bolton, Mich.
26. Geo. 3.
(c) Ld. Raym.
(d) 1. Ld.
Raym. 580.
(e) Doug. 749.
(f) Andr. 27.
(g) Strange
849. 944.
(h) Stra. 900.
(i) 1. Ld.
Raym. 1452.
(k) 1. Str. 470.
(l) 2. Burr. 1040.
(m) 2. Burr.
1458.
(n) 2. Willf. 35.
(o) 4. Burr.
2244.

As to THE SECOND PARTICULAR, viz. Whether a *certiorari* lies to the courts of THE CINQUE-PORTS.

Sec. 24. It hath been adjudged, that such a *certiorari* lies to such courts to remove an (p) indictment of sodomy there found, or an (q) order made by the justices of peace at a sessions there holden. It is said indeed, by (r) Rolle, that the reason why such an indictment may be removed is, because the offence is made felony by a late statute, and therefore the courts of the *Cinque-ports* cannot hold plea of it without a new charter; by which it seems to be implied, that in his opinion indictments in such courts of crimes whereof they have jurisdiction, are not removable. But the other books above cited seem to speak generally of all indictments, and to lay it down as a rule, that the privilege of the courts of the *Cinque-ports*, used time out of mind, that the king's writ doth not run there, is to be intended only of civil (s) causes between party and party.

(p) C. Car.
252, 253. 264.
291.
(q) 1. R. Abr. 395.
Style 14.
2. Hale 212.
(r) 2. Le. 86.
1. Siderfin 356.
3. Keble 154.
(s) 1. R. Abr.
395.
2. Burrow 849.
(t) Vide C.
Eliz. 910, 911.
Palm. 54. 55.
56. 96.
C. Jac. 531.
1. Siderfin 533.
Hardres 478.
476.

As to THE THIRD PARTICULAR, viz. Whether a *certiorari* lies to the courts of *Wals*.

Sec. 25. It seems to be settled, that such a *certiorari* lies to remove any indictment taken in *Wales* for a crime not capital.

(1) Vide *Rex v. Althoes*, 8. Mod. 135. where an indictment for murder was removed. *Strange* 553. *Wilson* 320.

Atkins 175. 182. 8. Modern 146. *Rex v. Griffith*, where the Court granted a *certiorari* to remove an indictment for a misdemeanour, 3. Term Rep. 658. (a) 1. R. Abr. 394. 2. Roll: 28, 29. C. Jac. 484. *Popham* 144. 2. Keble 471. *Cowper* 751. [Note 2.] C. Car. 248. *Ld. Raymond* 381. 1. Hale 157. *Strange* 704. (b) 1. *Balkeld* 146. Vide 4. *Burrow* 2457. It lies also to *Berwick*, and to other dominions of the Crown. 2. *Burrow* 835, 856, 861. 1. *Strange* 104. (c) C. Car. 248. 2. Keble 797, 798. (d) 1. Modern 64, 68. 2. Keble 685, 724. C. Car. 331, 332. 1. R. Abr. 394. 1. *Ventris* 93. 146. 1. Hale 158. (e) Vide c. 25. f. 146.

(f) Vide 1. R. Abr. 394. 2. Keble 786. 724. Neither do I find it agreed, (f) in what manner the king's bench shall proceed on any indictment removed from *Wales*.

But it is said, that an indictment of felony so removed, (g) 2. Keble 785, 799. 1. *Ventris* 146. 1. R. Abr. 394, 395. may be tried in the next (g) *English county*, by force of (h) 26. Hen. 8. c. But it seems (i) agreed, that the statute extends not to appeals. (b) *Sup. c. 25. f. 41, 42. Parry's Case*, *Cases C. L.* 101. (i) C. Car. 248. 2. Keble 797. 1. *Ventris* 146. 2. Hale 157. See B. 1. c. 31. f. 41. B. R. H. 165. *Ld. Raymond* 561, 580, 3. Bac. Abr. 351. 2. *Burrow* 835, to 858. *Douglas* 751.

AS TO THE FOURTH PARTICULAR, viz. Whether a *certiorari* lies to the courts of *London*.

(k) 3. Mod. 230. 6. Mod. 246. 1. *Burrow* 386. Vide 1. Black. 230. 3. Mod. 230, &c. *Hardres* 402. 419. 6. Modern 246. Vide 5. & 6. W. 8. M. c. 11. *Sec. 26.* It seems to be admitted in the late (k) Reports, that a *certiorari* may be granted to remove any indictment from *London* or *Middlesex*; but it is (!) said, that he who prays it ought to give three days notice to the other side: Also it is said, (m) that by a *certiorari* to *London*, the tenor of the indictment only shall be removed by the city charters. And it seems, (n) that anciently that city insisted on a privilege, that all indictments and proceedings for any cause, except felony, should be tried and determined there, and not elsewhere.

(l) *Raym.* 74. And to remove an indictment from *Hicks's Hall* for *Bigamy* the consent of the prosecutor must be had, *Stra.* 877. *Cowp.* 283., or for *forgerie* from the *Old Bailey*, *Stra.* 717. (m) 1. Keble 252. 1. *Sid.* 255. 230. Vide c. 25. f. 97. (n) C. Car. 128. 265.

As to THE SECOND POINT, *viz.* Where the court of king's bench uses a discretionary power in granting, denying, and filing a *certiorari*.

Seff. 27. It hath been (a) adjudged, that wherever a *certiorari* is by law grantable for an indictment, the Court is bound of right to award it at the instance of THE KING, because every indictment is the suit of the king, and he has a prerogative of suing it in what court he pleases. But it seems to be agreed, that it is left to the discretion of the Court either to grant or deny it at the prayer of the defendant (2). 10. Mod. 205.
278.
12. Mod. 390.
403. 601. 641.
Ld. Raymond
216. 469. 580.
608. 971.
1203. 1515.
2. Burrow
861.
(a) Pasf.

5. Geo. i. Burrow 2456. Strange 609. 8. Modern 331. 1. Ventris 63. 1. Mod. 41.

(2) This absolute right to a *certiorari* relates only to cases where the crown itself prosecuting by the attorney-general, is specially concerned, 1. Term Rep. 89. and where the matter is prosecuted by a private person, in the name of the crown, it issues unless sufficient cause is shewn against it. But on an application for it by a defendant, there must be a special ground laid to induce the Court to grant it. 4. Burrow 2458. Strange 583. 549. 1. Bar. K. B. 445. 2. Bar. K. B. 447. 177. Andrews 27. 2. Com. Dig. 18. 4. Term Rep. 161.

And agreeably hereto, it is laid (b) down as a general rule, that the Court will never grant it for the removal of an indictment before justices of gaol-delivery, without some special cause; (c) as where there is just reason to apprehend that the court below may be unreasonably prejudiced against the defendant; (d) or where there is so much difficulty in the case, that the Judge below desires that it may be determined in the king's bench (e); or where the king himself gives a special direction that the cause shall be removed; or where the (f) prosecution appears to be for a matter not properly criminal. 1. Salk.
144. 146.
1. Keble 4.
Far. 118.
(c) 1. Salk.
150.
Strange 583.
Ld. Raym.
1452.
(d) 1. Salk.
149.
(e) 1. Vent. 63.
1. Modern 41.
Ld. Ray. 938.
(f) 1. Salk. 151.
(g) 1. Sid. 54.

Seff. 28. It seems, (g) that the Court will not ordinarily, at the prayer of the defendant, grant a *certiorari* for the removal of an indictment of perjury, or forgery, or other heinous misdemeanor; for such crimes deserve all possible discountenance, and the *certiorari* might delay, if not wholly discourage, their prosecution.

† But the Court will grant it on the application of the defendant in perjury, from the *Old Bailey*, upon affidavit that he had twice paid costs for not going on to trial, the Judges being gone away (b): this, however, was upon the extraordinary circumstance of the case (i). They will also grant it at the instance of the defendant, on affidavit that the prosecutor's attorney was under-sheriff of *Middlesex*, and attended the grand jury on finding the bill (k). Also on the defendant appearing to be a man of good repute, and the prosecution on slight grounds (l). Also if it be clearly proved, (b) Stra. 1049.
(i) B. R. H.
354.
(k) Stra. 1068.
(l) Stra. 549.

(a) 1. Bar. K. proved, that the prosecution is malicious (a). Also after
B. 7. 41. conviction for compounding of felony, if the objections in
(b) 1. Bar. arrest of judgment are serious and weighty (b).
K. B. 415.

(c) 1. Salk. Sect. 29. Also it is said, (c) that the court of king's
145. It was bench will never grant a *certiorari* for a conviction of a
done in the *recusancy* upon a default at sessions; because by the (d) sta-
case of James tute such convictions are to be removed into THE EXCHE-
Duke of quer, and from thence process is to be awarded upon them.
York. But But the court of king's bench cannot proceed upon them,
this is singu- and therefore will not suffer them to come thither, lest the
lar. Holt statute should be evaded.
132.
(d) 3. Jac. 1.

c. 4. f. 9.
Vide B. 1. c. 10. f. 23.

Sect. 30. It seems from THE YEAR-BOOK of 16. Edw. 4.
(4) It is said that it is a good objection against the granting a *cer-*
the party may *tiorari*, that issue is joined in the court below, and a *venue*
waive the awarded for the trial of it (4). For it appears by that
issue. (c) book, where a *certiorari* had been granted in such a case,
Carthew 6. that the Court, being afterwards apprised of the matter, re-
(e) 16. Ed. 4. 5. manded the cause.
B. Coron. 162.

(f) 1. Salk. Sect. 31. It seems (f) agreed, that a *certiorari* shall
149. never be granted to remove an indictment or appeal af-
ter a conviction, unless for some special cause; as where
Ld. Raymond the Judge below is doubtful what judgment is proper to
137. 951. 1372. be given; for unless there be some such reason, the Judge
6. Modern 17. who tried the cause shall not be prevented from giving
Carthew 6. judgment in it; for it cannot be intended but that he is
Strange 612. best acquainted with the circumstances of it, and conse-
1227. quently best able to judge what fine, or other punishment is
Barnard 749. proper for it.
1. Mod. 319.

Sect. 32. But it hath been adjudged, (g) that a *certiorari*
(g) 1. Sid. 296. for the removal of a presentment before justices in eyre of a
1. Keble 81, matter which is inquirable and punishable by the *forest law*
82. only, shall not be granted before, but only after conviction;
for if it should be granted before, the offence would be dis-
punishable; but it may be granted after conviction, in order
to give the party, the right of whose freehold is concerned
in it, an opportunity so far to (b) traverse it.

(b) Vide F. Affize 42.
1. Inst. 294,
95. 1. Edw. 3. 48. B. Forest 3. 1. Siderfin 296. 2. Keble 81, 82.

(i) Rex v. Sect. 33. The Court has (i) refused to grant a *certiorari*
Combs, Hil. to remove a recognizance of appearance before justices of
Geo. 1. oyer and terminer, &c. because the court below is most pro-
per to judge, upon the whole circumstances of the case, which
are equitably to be considered, whether it ought to be ef-
treated or not.

Sect.

Sec. 34. There is a rule in the court of king's bench, that no order of commissioners of sewers ought to be filed without notice given to the parties concerned. Also it is every (a) day's practice of that court, before it will suffer the return of a *certiorari* for the removal of the orders of such commissioners to be filed, to hear affidavits concerning the facts whereon they are grounded; and if the matter shall still appear doubtful, to direct the trial of feigned issues, and either to file the return, or supersede the *certiorari*, and grant a *procedendo*, as shall appear to be most reasonable, for the trial of such issues, and to give (b) costs against the prosecutor of the *certiorari*, if it appear to have been groundless.

(a) Vide
1. Salk. 149.
2. Keble 157.
seems contrary.

(b) Vide
2. Keb. 500.

† But a *certiorari* to bring up an order for the removal of their clerk, is of common right, and not discretionary.

Strange 609.
8. Mod. 331.
Fort. 374.

† Also the court of king's bench hath refused to grant a *certiorari* to remove the record and proceedings of a court-leet in order to inquire into the property of an amercement where the fine has been estreated into the Duchy court of Lancaster.

Rex v. Ritson, 2. Term Rep. 184.

† Also the Court will not grant a *certiorari* to a defendant after he has appealed to the sessions pending such appeal.

Rex v. Sparrow, 2. Term Rep. 196. notis.

† Also the Court will not grant a *certiorari* to remove the assessments of the land tax.

Rex v. King, 2. Term Rep. 234.

• † Also the Court will not grant a *certiorari* to remove a poor rate.

Rex v. King, 2. Term Rep. 235.

AS TO THE THIRD POINT, *viz.* What restraints have been put by the statute upon the granting a *certiorari*.

Sec. 35. By 1. and 2. Ph. and Mary 13. c. 7. it is enacted, "That no writs of *habeas corpus*, or *certiorari*, shall be granted to remove any prisoner out of any gaol, or to remove any recognizance, except the same writs be signed (c) with the proper hands of the chief justice, or, in his absence, of one of the justices of the court out of which the same writ shall be awarded or made; upon pain that he that writeth any such writs, not being signed as is afore said, to forfeit for every such writ five pounds."

2. Ld. Raymond 1379.
11. Mod. 174.
12. Mod. 2, 3.

(c) Vide Salk. 150.
2. Strange 893.

Barrow 431.

Sec. 36. By 5. and 6. Will. and Mary, c. 11. also it is enacted, "That in Term-time, no writ of *certiorari* whatsoever, at the prosecution of any party indicted, be granted out of the king's bench to remove any indictment, or presentment from any general quarter sessions, before trial, but upon motion of counsel and by rule of court made in open court." But it is provided, "That in Vacation such writ may be granted by any justices of the said court, whose names shall be indorsed thereon, and also the name of the person at whose instance it is granted."

As to THE FOURTH POINT, *viz.* How the *fiat* for a *certiorari* is to be signed.

(a) 1. Salk.
150.
Holt 133.

Sec. 37. It is said, (a) that if a *certiorari* be taken out in Vacation, and *tested* of the precedent Term, the *fiat* for it must be signed by some Judge of the court, some time before the effoin-day of the subsequent Term, otherwise it is irregular, and the Court upon motion will order a *procedendo*. But it is said, that there is no need for any Judge to sign the writ of *certiorari* itself, but only in such cases wherein it is required by statute.

As to THE FIFTH POINT, *viz.* To whom the writ of *certiorari* is to be directed.

(b) 3. Keble
13.

4. H. 6. 15,
16.

S. P. C. 64.
Hobart 135.

(c) Dalt. c.

134.

Style 371.

2. Levinz

223.

Rastal 110.

(d) See the cases cited to the other parts of this section.

(e) Dyer 163.

(f) Reg. 74. 78. Rastal 55. 263. (g) Reg. Jud. 76. Sup. c. 9. s. 42. (h) 2. Hale 211. C. Car. 352, 253. 264. (i) 1. Lev. 223. 3. Keble 279.

Sec. 38. It seems, that notwithstanding (b) regularly it ought to be directed to the Judge of the inferior court, yet in some cases it may be directed to the proper (c) officer known to have the custody of the record to be removed, and in some other cases to (d) others, as shall be most agreeable to the usual course of approved precedents, which (e) seems to be the best guide whereby to judge of this matter. And accordingly it seems, that for an indictment or confession of an approver before a coroner, it shall be directed to the coroner alone; (f) and for an appeal, both (g) to the sheriff and coroner; and for an indictment in THE CINQUE-PORTS, to the (h) mayor and jurats; and for an indictment at an assize in a county palatine, to the chancellor of such (i) county, who shall send for it to the justices of assize.

Seft. 39. If the person who ought to certify a record, (a) 1. Keble as a justice of peace, (a) &c. who hath taken a recogni- 750.
zance, &c. or a (b) judge of *nisi prius*, who hath taken a 8. H. 4. 3. 5.
verdict, or a (c) coroner, who hath taken an inquest, &c. C. Jac. 669.
happen to die, having such a record in his custody, it seems, 21. H. 7. 1.
that a *certiorari* may be directed to his executor or admini- Strange 470.
strator to certify it. (d) Also it hath been adjudged, that it (b) Dyer 163.
may be directed to a justice of assize to certify a record of assize Rastal 439.
taken before his companion in his absence. 2. Inst. 424.
2. R. Abr.
629.
(c) B. Certio.
9.

Indictment 23. 43. Assize 40. (a) B. Rec. 81, 11. H. 7. 5.

Seft. 40. All the precedents I am able to find of *certiorari's* for the removal either of (e) indictments or (f) recognizances from sessions, are directed either to the justices of peace for the county generally, or to some of them in particular by name, and not to the *custos rotulorum*; and according to (g) *Lambard*, they are never directed to him: Yet it is taken for granted in THE (h) YEAR-BOOK of *Henry the Seventh*, that after a recognizance for the peace is brought in to the *custos rotulorum*, it shall be certified by him. But surely, if the *certiorari* be directed generally to the justices of the county or any one of them, it may be as well returned by any of them as by the *custos rotulorum*. And I question whether it can be well (i) returned by him, unless he do (i) Hob. 135.
it as a justice of peace, naming himself such? But if there are sufficient precedents to warrant the directing the *certiorari* to him as *custos rotulorum*, there can be no doubt but that a return by him as such will be good.

† And it has been adjudged, that a third person cannot ob- Daniel v.
ject to the misdirection of a *certiorari* to remove a cause Philips,
from an inferior court, if the proper officer in whose keeping 4. Term Rep.
the record was, waive the objection and return the record 499.
upon such writ.

AS TO THE SIXTH POINT, *viz.* Where a record may be removed into the court of king's bench without any writ of *certiorari*.

Seft. 41. It seems agreed, that if (k) a justice of peace, (k) Dalton c.
or other judge of record, having taken a recognizance, or 134.
inquisition, or recorded a riot, or done any other executory c. 7.
matter, within his jurisdiction, have still continued in the 8. Ed. 4. 18.
same commission, &c. without any interruption, the court B. Record 17.
of king's bench shall receive such record from his hands, 64.
without any writ of *certiorari*. Also it seems to be (l) 8. H. 4. 4. 3.
(l) Crom. 132,
133.

(l) Dyer 163. 2. Inst. 424. See March 112, 113,

agreed, that upon the death of both the justices of assize, the clerk of the assize may, without any *certiorari*, bring in the records of the verdicts of *nisi prius*; but that the (a) executors or administrators of a Judge can in no case bring in a record without a writ to authorise them to do it. Also it seems to be (b) agreed, that no record which is executed as by acquittal, &c. can be brought into a higher court without a writ. And it seems to be the stronger (c) opinion, that neither a justice who is out of commission at the time, or one who has been out of commission, but is afterwards restored, can certify any record without a writ of *certiorari*.

(a) 1. Dyer 163. Rastal 439.
 8. H. 4. 4.
 (b) 8. Edw. 4. 18.
 Lamb. B. 4.
 c. 7. f. 517.
 Cromp. 131.
 (c) Dalt. c. 134.
 8. H. 4. 4. 5.
 B. Gar. d' At-
 torney 9.
 B. Record 17. 64. Dyer 163. Rastal 438. Brook tit. *Certiorari*, pl. 9.

† AS TO THE SEVENTH POINT, *viz.* What is to be done before the allowance of a *certiorari*.

I shall consider,

† 1. What is to be done by a defendant before the allowance of a *certiorari* to remove AN INDICTMENT.

† 2. What is to be done before the removal of a JUDGMENT OR ORDER.

As to the first particular, *viz.* What is to be done by a defendant before the removal of an indictment.

A *feme covert* is not within this statute to find sureties.
 2. Hale 213.

Stat. 42. By 21. Jac. 1. c. 8. f. 7, 8. it is enacted, "That all writs of *certiorari* for the removal of any indictment of riot, forcible entry, or of assault and battery, at any quarter-sessions of the peace, or otherwise, shall be delivered at some quarter-sessions of the peace in open court; and that the party indicted shall, before the allowance thereof, become bound to the prosecutor in 10l. with sufficient sureties as the justices of peace, at their quarter-sessions, shall think fit, with condition to pay unto such prosecutor, within one month after conviction, such reasonable costs and damages as the said justices of peace of such counties where such indictments shall be found, in the said sessions of the peace, shall assess or allow; and in default thereof, it shall be lawful for the said justice to proceed to trial of such indictments, any such writs of *certiorari* notwithstanding."

It is observable, that these statutes do not (a) extend to all indictments at sessions in general, but only to those particular ones therein mentioned.

(a) 1. Keble 225. 727.
Vide inf. 61.

Seft. 43. But this defect was in a great measure (b) supplied by the rules of the court of king's bench, which, upon the removal of an indictment from *London* or *Middlesex*, required a recognizance from the defendant to carry down the record to trial the same Term on which the *certiorari* was returnable, or the Sittings after; and on the removal of an indictment from other counties (c), required such recognizance for a trial at the next assizes.

(b) Vide 1. Keble 33.
6. Mod. 246.
2. Salkeld 564.
Farresly 10.

(c) Shower 336.

Seft. 44. And agreeably hereto, it is enacted by 5. and 6. Will. and Mary, c. 11. and 8. and 9. Will. 3. c. 33. "That all the parties indicted at a general or quarter sessions of the peace, prosecuting *certiorari*, before the allowance thereof, shall find two sufficient manucaptors, who shall enter into a recognizance in the sum of 20l. before one or more justices of the peace of the county or place, (or (d) else before one of the Judges of the king's bench, in which case such Judge shall make mention of it under his hand, on the back of the writ) and the recognizance shall be with condition, at the return of such writ, to appear and plead to the indictment or presentment in the court of king's bench, and at his own costs to procure the issue that shall be joined upon the said indictment or presentment, or any plea relating thereto, to be tried at the next assizes for the county wherein the indictment was found after such *certiorari* shall be returnable, if not in *London*, *Westminster*, or *Middlesex*; and if there, then to cause it to be tried the next Term after wherein such *certiorari* shall be granted, or at the sitting after the said Term, if the court of king's bench shall not appoint any other time for the trial thereof; and if any other time shall be appointed by the Court, then at such other time, and to give due notice of such trial, to the prosecutor, or his clerk, in court; and (e) also, that the party or parties prosecuting such *certiorari*, shall appear from day to day in the said court of king's bench, and not depart until he or they shall be discharged by the said court: And such recognizances, *certiorari*'s, and indictments, shall be filed in the king's bench, and the name of the prosecutor (if he be the party grieved or injured) or some publick officer, indorsed on the back of the indictment; and if the person prosecuting such *certiorari*, being the defendant, shall not, before allowance thereof, procure such manucaptors to

It is said this act relates only to quarter sessions of the peace, not to indictments for perjury found at Hicks's hall, which is before the justices as justices of oyer and terminer, Burr. 1462. For the sessions there sit in both capacities, & draw up their orders with one title or with the other, according to the degree of the offence, and the *certiorari* are directed accordingly. Burrow 11. 10. Mod. 193. 205. 278. (d) Viz. By force of 8. & 9. Guil. 3. 33. (e) Viz. By 8. & 9. Guil. 3. 33.

"be

"be found as aforesaid, the justices of the peace shall and
 "may proceed to trial of the indictment notwithstanding
 "such *certiorari*."

(a) 1. Will.

139.

Burrow 54.

(b) Vide

1. Term Rep.

P. 104.

Seet. 45. And it is farther enacted by the said statute of 5. and 6. Will. and Mary, c. 11. "That if the defendant prosecuting such *certiorari*, be convicted, the king's bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a civil officer who shall prosecute on account of any fact that concerned him as officer to prosecute or present, (a) which costs shall be taxed according to the course of the said court; and the prosecutor, for the recovery of such costs, shall within ten days after demand (b) made of the defendant, and refusal of payment, on oath, have an attachment granted against the defendant by the said court for such his contempt; and the said recognizance shall not be discharged till the costs so taxed shall be paid."

Seet. 46. And the like in effect is enacted by the said statute of 5. & 6. Will. & Mary, c. 11. sect. 5. concerning the removal of indictments by *certiorari* within the counties palatine of *Chester*, *Lancaster* and *Durham*.

In the construction of these statutes, the following points seem most remarkable.

Seet. 47. FIRST. That notwithstanding, by the express words, justices of peace may proceed to trial of the indictments, notwithstanding the *certiorari*, if a proper recognizance be not given, yet they will be in contempt to the Court that awarded the *certiorari*, if they make no (c) return to it; for all writs must be obeyed unless good cause be shewn to the contrary; and the proper way of shewing is to return it.

(c) 1. Keble

225. 231. 538.

903.

2. Sid. 70.

Seet. 48. SECONDLY, That it appears from the manifest purport of these statutes, that they extend only to *certiorari*'s procured by persons indicted; from whence it follows, that those which are procured by the prosecutor of an indictment, remain as they were at (d) common law.

(d) 6. Mod.

42. 246.

(e) 2. Salk.

564.

Far. 10. 120.

Ld. Raym.

756.

Salk. 600. 659.

Seet. 49. THIRDLY, That (e) these statutes, being in the affirmative, as to the taking of recognizances, do not take away the power which the justices of the king's bench have by the common law of taking recognizances upon their granting *certiorari*'s; from whence it follows, that if any such justice, granting a *certiorari*, shall take a recognizance
 variant

variant from that prescribed by the act, either as to the sum or condition, &c. such recognizance will have the same force as it would have had, if these statutes had not been made; but it is said, that the *certiorari*, if procured by the defendant, will not in such case be a *superfedeas* to the proceedings below, as it would have been at the common law; for the statutes seem to be express, that the sessions may proceed notwithstanding any *certiorari* procured by a defendant, whereon such a recognizance is not given as is expressly prescribed.

SECT. 50. FOURTHLY, That if the persons offering to be sureties appear to be worth Twenty pounds, the justices (a) cannot refuse them. (a) March 27.

SECT. 51. FIFTHLY, That if divers be indicted (b) in the same indictment, and some of them find sureties, and others not, the indictment ought to be removed as to those who find sureties (because they shall not be prejudiced by the default of the others). And, as (c) some say, it shall be removed as to the others also. (b) March 27. (c) 1. Keb. 231. Vide 6. Edw. 4. 5. March 111.

SECT. 52. SIXTHLY, (d) That the master of the crown-office, in taxing the costs, ought only to consider those which are subsequent to the *certiorari*. (d) 1. Salk. 55. 2. Ld. Ray. 85. Rex v. Wallace, Mich. 14. Geo. 3.

SECT. 53. SEVENTHLY, That the prosecutor, by accepting the costs so taxed, is not restrained from aggravating the fine to be set on the defendant, because he has a right to such costs by the express words of the statutes; and therefore the defendant can claim no indulgence from having paid them:—But in other cases, after a prosecutor has accepted costs from a defendant, he cannot by the rules of the Court, aggravate his fine; because in such cases, having no right to demand costs, if he take them at all, he must take them by way of satisfaction of the wrong; after which it is unreasonable in him to harass the defendant. And this I take to be a common practice; though in (e) *Salkeld's Reports* there seems to be a note to the contrary. (e) 1. Salk. 55.

† EIGHTHLY, That the clause in the act respecting the payment of costs does not extend to a prosecutor, even when bound over by the magistrate to prosecute, unless he be either a civil officer, or a party injured. And it is immaterial, whether the name be on the back of the indictment or not, provided it be proved by affidavit that the prosecutor is in fact a party injured or a civil officer. 1. Will. 139. 1. Burr. 54. 431.

NINTHLY,

4. Burr. 2126. † NINTHLY, That if the prosecutor has received a third part of the fine, and then applies for his costs under the recognizance, the Court will order what he has received to be deducted from the amount of the taxation.

Rex v. Of-

burn,

S. Law Costs

267.

Rex v. Cham-

berlyne, Hil.

26. Geo. 3.

† TENTHLY, That the payment of a fine does not discharge the defendant's recognizance for the costs.

† ELEVENTHLY, That on taxation, costs become a vested debt, and the personal representatives of the person to whom they were due may proceed to recover them.

i. Burr. 11.

Stra. 1165.

Burr. 1463.

TWELFTHLY, That the Court will not order the recognizance of a defendant to stand as a security of the costs of the prosecutor, if such recognizance be as at common law, and not upon the statute. But if the defendant forfeit his recognizance under the statute, such recognizance shall stand as a security to the prosecutor for his costs (if taxed) for the defendant's not going on to trial pursuant to the condition, notwithstanding he was afterwards acquitted, and the prosecutor had taken him in execution for the amount of them.

(a) 1. Salk.

370. 193.

S. range 946.

SECT. 54. THIRTEENTHLY, (a) That notwithstanding the condition of the recognizance seems to be express, that the defendant shall procure a trial at the next assizes, &c. yet it shall not be forfeited, unless the prosecutor of the indictment give rules according to the course of the court.

(b) 1. Salk.

380.

R. 24. Somers,

Mich. 6. Geo. 1.

S. divide Rex v.

Gale, 1. Geo 3.

SECT. 55. FOURTEENTHLY, That after such (b) recognizance is forfeited by the defendant's not procuring a trial according to the purport of the condition, the Court will not hear any motion to quash the indictment, or *certiorari*.

† As to the second particular, *viz.* What is to be done before the removal of a judgment or order.

How the *certiorari* shall issue to remove judgments and orders, &c.

† SECT. 56. By 5. Geo. 2. c. 19. it is recited, "Whereas in many cases his Majesty's justices of the peace by law are empowered to give or make judgments or orders; and divers writs of *certiorari* have been procured to remove such judgments or orders into his Majesty's court of king's bench at Westminster, in hopes thereby to discourage and weary out the parties concerned in such judgments or orders by great delays and expences;" and enacted, "That no *certiorari* shall be allowed to remove any such judgment or order, unless the party or parties prosecuting such *certiorari* before the allowance thereof shall enter into a recognizance, " with

“ with sufficient sureties, before one or more justices of the peace of the county or place, or before the justices at their general quarter-sessions, or general sessions, where such judgment or order shall have been given or made, or before any one of his Majesty’s justices of the said court of king’s bench, in the sum of fifty pounds, with condition to prosecute the same at his or their own costs and charges with effect, without any wilful or affected delay, and to pay the party or parties in whose favour and for whose benefit such judgment or order was given or made, within one month after the said order or judgment shall be confirmed, their full costs and charges, to be taxed according to the course of the court where such judgments or orders shall be confirmed; and in case the party or parties prosecuting such *certiorari* shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall and may be lawful for the said justices to proceed and make such further order or orders for the benefit of the party or parties for whom such judgment shall be given, in such manner as if no *certiorari* had been granted.”

† And by 5. Geo. 2. c. 19. s. 3. “ That the recognizance shall be certified to the king’s bench, and there filed with the *certiorari*, and order or judgment thereby removed; and if the said order or judgment shall be confirmed by the said Court, the persons intitled to such costs for the recovery thereof, within ten days after demand made of the person or persons who ought to pay the said costs, upon oath made of making such demand and refusal, shall have an *attachment* for contempt, and the recognizance shall not be discharged until the costs shall be paid, and the order so confirmed complied with and obeyed.”

How recognizances shall be certified, and costs recovered.

† And for the better preventing vexatious delays and expence, occasioned by the suing forth writs of *certiorari* for the removal of convictions, judgments, orders, and other proceedings before justices of the peace, it is further enacted by 13. Geo. 2. c. 18. sect. 5. “ That no writ of *certiorari* shall be granted, issued forth, or allowed to remove any conviction, judgment, order, or other proceeding had or made by or before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof, unless such *certiorari* be moved or applied for within six calendar months next after such conviction, judgment, order, or other proceedings shall

For what proceedings are not removable. Strange 391.

“ be

"be so had or made; and unless it be duly proved upon oath, that the said party or parties suing forth the same, hath or have given six days notice thereof in writing to the justice or justices, or to two of them (if so many there be), by and before whom such conviction, judgment, order or other proceedings shall be so had or made; to the end that such justice or justices, or the parties therein concerned may shew cause, if he or they shall think fit, against the issuing or granting such *certiorari*."

In the construction of these statutes the following points seem most remarkable.

Rex v. How- † FIRST, That a *certiorari* to remove a conviction must, by
let, 1. Will. 3. this later act, be applied for within six months from the date
Rex v. Boug- of such conviction.
hey, 4. Term
Rep. 281.

Rex v. † SECONDLY, That the party prosecuting a *certiorari* to
Boughey, remove a conviction, must himself enter into a recognizance
4. Term Rep. with two sureties in fifty pounds each to prosecute with
281. effect, &c.

Rex v. Mad- † THIRDLY, That if any material part of an order of sessions
ley, 2. Stra. be quashed, although the residue be affirmed by the king's
1198. bench upon its removal thither by *certiorari*, no costs are payable under 5. Geo: 2. c. 19.

Rex v. Edg- † FOURTHLY, That where a sessions case removed into the
worth, court of king's bench by *certiorari* is sent down to be re-
4. Term Rep. stated, and upon its being returned amended, the parish re-
218. moving it abandon the prosecution, they are not liable to costs under 5. Geo. 2. c. 19.; but that if they dispute the amended order, they shall pay costs.

Rex v. Jen- † FIFTHLY, That where there is no recognizance entered
kinson, into for the payment of costs upon removing summary pro-
1. Term Rep. ceedings by *certiorari*, the Court are not authorised to grant
81. them by 13. Geo. 2. c. 18.; but that it is discretionary in the Court whether they will grant a *certiorari* or not, and that the Court will oblige a party applying in this case for such writ to enter into a recognizance to pay costs.

SIXTHLY,

† SIXTHLY, That if, on application for this writ to remove *Rex v. Bais*, a conviction, the Court see that the justices have drawn *3. Term Rep.* a proper conclusion, they will not grant a *certiorari*, though *251.* the conclusion was drawn from presumptive evidence.

† SEVENTHLY, That the Court will not take notice of any fault contained in the *certiorari* to influence their judgment respecting the conviction. *Rex v. Lifton, 5. Term Rep. 338.*

AS TO THE EIGHTH POINT, *viz.* How far a *certiorari* is a *superfedeas* to the court below.

Seft. 57. It is (*a*) agreed by all the books, that after it is allowed by such court, it makes all its subsequent proceedings on the record that is removed by it, erroneous. (*a*) *C. Car. 261.*

Also it seems to be generally (*b*) agreed, that a *certiorari* for the removal of an indictment of forcible entry found at the sessions of the peace, being delivered to any one justice of peace of the same place, before the statute of 21. Jac. 1. set forth more at large *seft. 45.* which requires, "that every such *certiorari* shall be delivered at some quarter-sessions in open court," did (by such delivery without more) so far supersede the power of the sessions, that all its subsequent proceedings thereon, and even an execution of a prior award on the same indictment, would have been erroneous. And it seems to be generally (*c*) agreed, that any one such justice to whom such *certiorari* should be delivered, might and ought thereupon immediately to have awarded a *superfedeas* to the sheriff, in order to have stopped the execution of any prior award of such court upon such indictment. (*b*) *C. Eliz. 915.*
2. Keble 306.
1. Moor 677.
1. Salkeld 151.
Ld. Raym. 610. 1515.
(c) C. Eliz. 915.
Moor 677.
Qu. F. N. B. 237.
Dalton c. 134.

Seft. 58. It seems to be the better (*d*) opinion, that a *superfedeas* on such a *certiorari* being delivered to the sheriff before he hath begun to put a process in execution, will make his subsequent execution of it wholly void; because it is a ministerial act, and not a judicial one. But if such *superfedeas* be not delivered to the sheriff till after he have in part executed such award, it (*e*) seems, that he may afterwards be authorised to go through with it by a writ of *venditioni exponas*, in the same manner as he may in the like case after a writ of error. But I (*f*) question, whether he can lawfully proceed after such *superfedeas* actually delivered to him, without the writ of *venditioni exponas*. (*d*) *C. Eliz. 915, 916.*
Moor 677.
2. Hale 215.
(e) Dyer 98.
Yelverton 6.
C. Eliz. 597.
2. R. Abr. 894.
2. R. Abr. 491.
3. Keble 269.
174. 309.

(*f*) See the books next above cited, and *Moor 542.* *1. Salkeld 147.*

Sett. 59. It seems to be the stronger opinion, that a *certiorari*, being once delivered; makes all subsequent proceedings on the record that ought to be removed by it

(a) *Yelver.* 32.
Dyer 245.

6. H. 7. 15,
16.

B. Record, 8.
Dalt. c. 134.

Lamb. f. 516.
Crompt. 132.

2. Hale 415.
(b) *Dyer* 245.

1. Keble 54.
107. 118.

(a) erroneous, by force of these words, "*coram nobis terminari volumus, et non alibi*," whether such proceedings are before or after its return, and notwithstanding the party who prosecuted it never make any other suit to have the record certified, but only by causing the *certiorari* to be delivered. And in this respect a *certiorari* hath a stronger force than a writ of error; for that becomes (b) of no effect, if the party who prosecuted it neglect to get the record certified in a reasonable time.

1. Siderfin 268. 2. R. Abr. 491.

(c) *Moor* 73.
Keble 93.

(d) *Dyer* 222.
Moor 73.

1. Inf. 128.

(e) C. Jac.
282. sup. c. 5.

f. 8. 9, 10,
11.

C. Eliz. 152. 915. C. Jac. 43. *Yelv.* 52. 57. 121. C. Car. 79. 2. Jones 209.

And it seems to be holden in some (c) books, that the very issuing of a *certiorari* is of itself a *superfedeas* to the inferior court, whether the *certiorari* be ever delivered or not; in the same manner as an appearance in the court above, and a *superfedeas* purchased there, will avoid (d) an outlawry pronounced after, though such *superfedeas* were not delivered to the sheriff before the *quinto exactus*; but the contrary hereto, in relation to a *certiorari*, seems more agreeable to the general tenor of the (e) books and the reason of the thing.

(f) 1. Salk.
144. 150.

And it hath been (f) adjudged, that if a *certiorari* for the removal of an indictment before justices of peace be not delivered before the jury be sworn for the trial of it, the justices may proceed.

(g) 1. Keble
944.

(h) *Sup. f.* 45.
to 62.

A *certiorari* re-
moves all

things done between the *teste* and return, *Ld. Raym.* 835. 1305.

Also it hath been (g) holden, that a *certiorari* is of no effect, unless it be delivered before its return is expired. And it is certain, that by force of the statute it cannot at this time be any (h) *superfedeas* to the proceedings on an indictment at sessions, without a proper recognizance, &c.

(i) 2. R. A.
492.

Dalt. c. 75.
(k) C. Jac. 282.

Yelver. 207.
1. Bulf. 155.

Sett. 60. It hath been (i) holden, that a *certiorari* for the removal of a recognizance for the good behaviour, or for an appearance at sessions, will supersede its obligation. But this would be highly inconvenient; and the contrary opinion seems to be supported by the better (k) authority.

(l) 16. Ed. 4. 5.
B. Dif. de

Pro. 52.

Sett. 61. It (l) seems, that if an indictment be removed by *certiorari* after issue joined, and afterwards remanded, the inferior

inferior court shall proceed to trial, in the same manner as it would have done, if no *certiorari* had been granted:

Sect. 62. I shall take it for (a) granted, that inferior courts proceeding after a *certiorari* delivered, where by law they ought not, are punishable for a contempt; as hath been more fully shewn, chap. 22. sect. 28.

(a) Raym. 186.
Farrelly 38.
1. Vent. 66.
1. Salk. 144.
148.
Yelverton 32.

Sect. 63. Also it seems, that by the common law if a *certiorari* be once filed, the proceeding below can (b) never be revived by any *procedendo* (†).

(b) Agreed by the Court of King's bench in the

case of the King v. Whitlow, Hil. 6. Geo. 1. Vide also 2. Burn. 749. King v. Gwynne. — (†) The *certiorari* may be taken off the file if it was improperly obtained, 1. Burr. 488. 4. Burr. 2459. 2522. on motion for that purpose previous to a motion for *procedendo*, 4. Burr. 2456. If the defendant is convicted on confession, and the prosecutor brings a *certiorari*, the defendant shall have a *procedendo*, 2. Burrow 749.

As to THE NINTH POINT, viz. In what manner a *certiorari* is to be returned.

Sect. 64. I shall refer the reader for the form in which it is to be done, to (c) *Lambard* and (d) *Dalton*, and shall farther take notice only of these following particulars.

(c) Lamb. b.
2. c. 2. 107,
108.
(d) Dalt. c. 73.
Carthew 223.

134. 1. Burn 311. to 319.

Sect. 65. FIRST, That every such return ought to be under the seal (e) of the inferior court, or of the justice (e) C. Eliz. or justices to whom it is directed; and if such court have no proper seal, it seems, (f) that the return may be well made under any other.

821.
(f) 1. Lev.
311.
1. Siderfin 70.
Salkeld 479.

Shower 336. A return was held bad because it was upon paper instead of parchment, 1. Barnard. 113.

Sect. 66. SECONDLY, That every such return must be made by the very same person to whom the *certiorari* is directed; for if it be directed to "the justices of the peace" of such a place, and the (g) clerk of the peace only return it; or to "the constable," or to "the recorder of B." and the (h) deputy constable, or deputy recorder, return it, without shewing in the return that the principal had power to make a deputy; or "to the steward of St. Paul's," and the steward of the church of St. (i) Peter and St. Paul return it, nothing is removed. Yet it is (k) certain, that if it be directed "to the justice of Chester," it may be returned by A. B. chief justice; for the same officer is known to be meant in the writ and return, and his description

(g) 2. Salk.
479
(h) 1. R. Abr.
752. 754.
2. Keble 383.
(i) 2. Keble
385.
(k) 1. Sid. 64.
1. Levinz 50.
2. Salkeld 432.
1. Keble 165.
187.

(a) Yelver. 212. *scriptio in both is in substance the same. Also it is (a) said, that if a writ of error be directed to several justices, and returned by part of them only; yet if it (b) truly recite the record, it so far removes it, that a new writ of error lies de recordo quod coram nobis residet, &c. And (c) quere how the Court shall proceed upon the like mis-return of a* *certiorari.*

(6) Yelv. 679.

29. H. 6. 12.

1. R. Abr. 753. (c) F. N. B. 71. Holt 157. A *certiorari* to remove an order of two justices may be directed to the sessions, and returned by them, Strange 470.

(d) 21. H. 7.

21.

C. Jac. 669.

2. H. 7. 1.

Sup. sect. 43.

(e) Reg. v.

Randal,

13. Ann.

(f) Supra,

sect. 43.

Reg. Origin 90. 151. 283, 284, &c. F. N. B. 81. 2. H. 7. B. Peace 11. Dalton c. 70.

(g) Crompt.

111, 112.

Lamb. b. 4.

c. 7. f. 516,

517.

Dalt. c. 134.

(h) 22. Ed. 4.

12. b. 13.

12. H. 7. 25.

3. R. 3. 9.

B. Indict. 32.

50. Cause à remover Plea, 27. Vide 1. Keble 263. Vide 11. Mod. 172.

(i) 6. Mod. 90.

Reg. v. Nor-

ton, Pas.

11. Annæ.

(k) Sup. f. 34. *certiorari* is directed, may make what return to it he pleases; and the Court will not stop the filing of it on affidavits of its falsity, except only where the public good requires it, as in the case of the (k) commissioners of sewers, or for some other special reason: But regularly the (l) only remedy against such a false return, is an action on the case at the suit of the party injured by it, and information, &c. at the suit of the king.

(l) 6. Mod.

90.

Strange 63.

sect. 70. SIXTHLY, (m) That whatsoever matters are put into the return to a certiorari, by way of explanation or otherwise, besides those which are expressly ordered to be certified, are put in without any warrant or authority, and consequently shall be no more regarded by the Court above, than if they had been wholly omitted.

(m) 2. Salk.

492, 493.

SECT. 71. SEVENTHLY; That (a) generally the return to a *certiorari* ought to certify the record itself, or the tenor of it, or the (b) tenor of the tenor, (c) according as the writ requires. And agreeably hereto it hath been (d) adjudged, that if, on a *certiorari* to return an order of justices of peace, the tenor of such order be certified, the return is naught. Yet a return of the tenor of an indictment from London on a *certiorari* to remove the indictment itself, is good by the city charter, as hath been already shewn, sect. 26.

(a) 1. Salkeld 147. 2. Salkeld 492, 493.

Also, it (e) seems to have been generally holden, that wherever the purport of a *certiorari* is not to proceed upon the record to be removed, but only to try an issue of *nil tiel record*, it is sufficient to certify the tenor of the record, whether the *certiorari* require a certificate of the record itself, or of the tenor of it only.

However; I take it to be clear, that if the Court which awards such a *certiorari*, have no jurisdiction to proceed on the record thereby ordered to be removed; as where the Court of (f) common pleas award a *certiorari* for the removal of an indictment on the issue of *nil tiel record*, concerning such indictment, the court below ought only to certify the tenor of it, lest there should be a failure of justice.

AS TO THE TENTH POINT; viz. Where a record is removed by *certiorari*.

SECT. 72. Having premised that nothing can be removed by it where it is improperly (g) directed, or (h) returned, (for which I shall refer the reader to the foregoing parts of this chapter) I shall in this place observe only the following particulars:

SECT. 73. FIRST, That it seems to be settled at this day, that as a writ of (i) error may remove a judgment given, and a (k) *recordare* may remove a plaint entered, after its *teste* and before its return, so likewise a (l) *certiorari* may remove a record that shall come within its description before the time of its return, though there were no such record in esse at the time of its *teste*, (m) nor at the time when it was first delivered to the court below.

1. Ventris 63. B. Recordare 9. 1. Mod. 41. 1. Salkeld 149. Farrelly 138. Lamb. b. 4. 7. f. 517. Crompton 132. Dalton c. 134. 1. Mod. 112. Yelver. 32. Con. 1. Sid. 317. 2. Keble 141, 142. Noy 54. 1. R. Abr. 749. (m) 1. R. Abr. 395. Ld. Raym. 833. 1305. Vide 11. Mod. 110. 236. A verdict cannot be removed from sessions before judgment, Strange 765. 819.

(a) 3. H. 6.
30.
F. N. B. 71.
F. Record. 2.

Sec. 74. SECONDLY, That as a *recordare* will remove a plaint that was (a) discontinued below, because the Court above will proceed only on the plaint, and all the other proceedings thereon below are to no purpose, there seems to be the like reason that a *certiorari* also may remove an indictment which was discontinued below.

A *certiorari*
to remove an
indictment,
will not re-
move a con-
viction.

Sec. 75. THIRDLY, That as a writ of error can remove no record which materially varies from the description set forth in such writ, to neither can a *certiorari*, as in the following instances.

Lord Raymond 971.

Sec. 76. I. Where the writ describes an indictment or other record taken before *A. B.* and eight others, and that certified appears to have been taken before (b) *A. B.* and seven others only, or (c) before him and the other eight mentioned, and others also besides them; or where the writ describes a record (d) *coram A. et B. et sociis suis*; and the record certified appears to have been taken *coram C. D. et sociis suis*; or (e) where the writ calls the justices, before whom the record is taken, *justiciarios nostros*, and in the record certified they appear to have taken it as justices of a former king.

(b) C. Jac.
254. 255.
Yelverton 42.
Blowden 392.
(c) B. Err. 13.
28. H. 6. 11.
1. Keble 129.
283. 192.
(d) 1. Sid.
448.
Parallel case
1. R. Abr.
753. (e) 1. Rol. Abr. 754. Dyer 105. Yelverton 212. Lord Raymond 1203.

(f) 2. Affize
3.
S. P. C. 70.
B. Variance
62.

Sec. 77. II. Where the writ describes an indictment for stealing (f) two horses, and that certified is for stealing one horse only.

Lamb. b. 4. c. 7. f. 518. B. Cor. 69. Crompton 132. 1. Bulst. 155.

(g) 1. Salk.
145.
Farrelly 97.

Sec. 78. III. (g) Where the writ describes an order concerning foreign salt, and that certified is concerning salt in general.

(b) 2. Salk.
412.
C. Eliz. 882.
(i) 12. Affize
2.
B. Variance
66.

Sec. 79. IV. (b) Where the writ describes an order concerning the town of *Needham-Market*, or concerning the manor of *Ansly*, (i) and an order concerning the town of *Needham*, or the manor of *Ansley*, is returned, without shewing in the return that they are both the same town.

(k) 1. Salk.
246. 151.
Reg. v. Hot-
spur, Hil.
23. Ann. Con.
1. R. Abr.
39.
102. 122. Dalton 6. 134. March 112.

Sec. 80. V. Where the writ mentions only (k) orders against *A. B.* and *C.* or indictments wherein *A. B.* and *C.* are indicted, and those certified are against *A.* only, or against *A* and *B.* only. Yet (l) it is taken for granted in

many

many books, neither do I find it any where denied, that a *certiorari* for the removal of all indictments against *A.* may remove one wherein the said *A.* is indicted, together with twenty others, so far as it concerns him; because in judgment of law it is a several indictment as to every one of the persons indicted. But I do not find it (a) agreed, whether, in such a case, the indictment shall be removed so far as it concerns the other twenty?

(a) Aff. 6. Ed. 4. 5.
B. Record, 57.

Lamb. b. 4. c. 7. f. 517. Crompton 132. Dalton c. 134. Denied, March 112. 1. Keble 231. 10. Modern 205. Lord Raymond 609. 1203.

SECT. 81. VI. Where there is a (b) material variance between the writ and the records certified, in the names or additions of the parties; as where the writ gives the defendant the surname of (c) *Giggure*, and the record certified that of *Giggeer*; or where the writ commands the removal of all convictions against (d) *Henry*, coachman, *quocunque nomine censeatur*, and those certified are against *Henry Munton*, coachman; or where the writ calls the defendant *John* (e) of *Stiles*, and the record is *John Stiles*; or where the one calls him (f) knight and baronet, and the other baronet only; or the one (g) *Garret Malines*, and the other *Gerrard Malines*; or the one *J. S. nuper de B.* and the other *J. S. nuper de C.*; or the one *J. S. of B. sadler*, (i) and the other *J. S. of B. salter*.

(b) Vide 1. R. Abr. 754.

(c) Salk. 264.

(d) Ad Mich. 3. Geo. 1.

(e) 26. Affiz. 31.

(f) C. Jac. 633.

(g) C. Jac. 477.

2. R. Abr. 329.

Such a variance between

a protection

and the writ

adjudged fatal.

(b) Adj. in a

writ of error, Ainsworth and Wilson, Hil. 5. Geo. 1. Par. Case 1. To a *certiorari* on a writ of error diminution may be certified, 8. Mod. 31. Siderfin 193. (i) Dyer 173. 1. R. Abr. 753.

Yet if the variance be only in the spelling, and the words have the very same sound either way, as (k) *Bird* and *Burd*, (l) *Shelbury* and *Shelbery*, it seems that it will not be material; because it appears not by any record of the Court but that the name in the *certiorari* may be the true name, and the record certified describing one by a name of the same sound, shall be intended to mean the same person.

(k) C. Eliz. 172.

Con. 25. Edw. 3. 43.

(l) Vide C. Eliz. 172.

1. R. Abr. 797.

2. R. Abr. 329.

Also, if a *certiorari* name the party without any addition, and the record certified name him with an addition; yet it seems that it may be probably argued, that the record may be well removed by such writ, in the same manner as it may be by a writ of (m) error which has the like variance. But if a writ of error describe a person with an addition which is omitted in the record certified, it hath been (n) lately adjudged, contrary to the opinion of *Sir Edward Coke's* (o) *Third Report* to the contrary (which seems to be rather contradicted than supported by the (p) authorities

(m) 1. Sid. 193.

9. H. 6. 1.

Dyer 25.

(n) Shute v. Car. Hil.

3. Geo. 1.

9. H. 6. 1.

B. Variance 6.

Vide Dyer 25.

Con. 1. Sid. 10.

2. R. Abr. 328, 329. (o) 3. Co. 2. 1. R. Abr. 752. (p) 9. H. 6. 1. 7. Affize 5. 26. Affize 31.

cited to maintain it), that it cannot remove the record; and the reason seems to be the same in respect of a *certiorari*.

If the writ name more defendants than are in the record, it is variance, *Strange* 116. But it need not describe whether the offence be laid *contra formam statuti*, *Strapge* 845. Vide also *2. Hale* 214.

A *certiorari* to remove a conviction on indictment must give the defendant a day in court, *Lord Raymond* 971. *Strange* 116. 845.

As to THE ELEVENTH POINT, viz. What is to be done by the court above, where the record mentioned in a *certiorari* is not removed by it,

Sett. 82. It is (a) said, that such court cannot in such case proceed upon the record; because in judgment of law it still remains in the court below, but will either (b) quash the writ, and (c) award a new one, or suffer the court below to proceed in the cause, and take such (d) order in relation to the defendant's appearance, either in the one court or the other, to answer the farther prosecution of the cause against him, as shall in discretion appear to be most proper.

(a) 12. H. 7. 25.
2. R. 3. 9.
3. Affize 3.
Wile 1. Sid. 193.
2. Keble 142.
(b) 1. Keble 102.
1. Salkeld 147.
(c) *Str.* 1327. 3. Affize 3. (d) 12. H. 7. 25. 3. Affize 3. 2. R. 3. 9. 20.
B. Indict. 50. B. Cor. 69. 2. Keble 142. Lamb. b. 4. c. 7. f. 518. Sup. c. 25.
fest, 12. 2. Hale c. 198. Carthew 223. 2. Bar. K. B. 413.

CHAPTER THE TWENTY-SEVENTH,

CONTINUED.

OF PROCESS

IN

THE SUPERIOR COURT.

AND now I shall consider what *process* is to be awarded after the removal of a record by *certiorari* into a superior court.

Sett. 83. As to which I take it be agreed, that, after such removal, if the defendant do not appear in the court of king's bench, the same (a) kind of process lies against him as if the cause had been originally commenced there. (a) S. P. C. Summary 211, Carthew 223.

Also I take it to be (b) agreed, that seeing by such removal the cause is wholly put without day, there is no way to non-suit the plaintiff, before he hath appeared in the court of king's bench, but by taking out a *scire facias* to warn him to prosecute his appeal in that court. Whereupon if the sheriff return a *scire feci*, he shall be nonsuit; and if the sheriff return a *nihil*, a *scire facias sicut alias* shall be awarded; whereupon if the sheriff return a second *nihil*, I do not find it (c) agreed what ought farther to be done (d). (b) S. P. C. 70. 48. Ed. 3. 24. 48. Affize 37. 1. Salkeld 61. 6. Mod. 246. B. Appeal 15. 140. F. Cor. 105. (c) Vide S. P. C. 70. 72. (d) We should

48. Ed. 3. 22. 48. Affize 3. B. Appeal 15. 140. F. Corone 105. suppose a nonsuit. Bac. Ab. 359. notes,

CHAPTER THE TWENTY-SEVENTH.

CONTINUED.

OF ERROR

IN

P R O C E S S,

AS to the seventh particular, viz. Where the process on an appeal, indictment, or information, shall be said to be *discontinued*, or *miscontinued*, or *put without day*.

SECT. 84. Having premised, that it seems to be agreed, that every suit, whether civil or criminal, and also every process in such suit against jurors ought to be properly continued from day to day, from its commencement to its conclusion, without any the least gap or chasm; and that the suffering any such gap or chasm, is properly (a) called a *discontinuance*; and the continuing of the suit by (b) improper process, as by a *capias* instead of a *distingas*, or by giving the parties an (c) illegal day, is properly called a *miscontinuance*;

(a) F. Judg.
12.
Finch 431.
Co. Lit. 325.
B. Amend. 17.
F. Pro. 124.
127.

1. H. 7. 2. 22. Edw. 3. 2. 22. Ed. 4. 3. 12. H. 4. 3. (b) 21. H. 7. 16. 8. H. 6. 29.
12. H. 4. 3. 10. H. 7. 21. Keilway 36. Finch 431. Coke Lit. 325. B. Dis. de
Pro. 11. 23. 50. 57. 61. 12. H. 4. 18. Con. 40. E. 3. 16. F. Amend. 12. (c) B.
Dis. de Pro. 23. 21. H. 7. 16.

I shall for the more distinct understanding of the learning of this kind, endeavour more particularly to shew,

1. In what particular instances process is generally said to be discontinued:

2. Where to be miscontinued;

3. Where to be put without day.

PRO-

PROCESS is generally said to be discontinued in the following instances :

SECT. 85. FIRST, Where the second is not *tested* on the very same *(a)* day on which the first is returnable; as where a *venire facias* is returnable on the twenty-third of January, and the *distringas* is *tested* on the twenty-fourth or any other subsequent day.

(a) 1. Bulst. 141, 142, 143.
Yelver. 204, 205.
C. Jar. 283, 284.
6. Modern 281, 282, 283. 1. Salkeld 51.

SECT. 86. SECONDLY, Where there is a Term intervening between the *teste* and return of a *(b)* *capias*; for the law will not suffer any such *capias*, lest thereby the defendant should be imprisoned an unreasonable time; but an original may be continued by any *(c)* other process, except a *capias*, though it have a Term or more intervening between its *teste* and return. *(d)* Neither is it any objection to an *exigent*, that it is not made returnable on the next Term after its *teste*, because it must allow time enough for five county courts to be holden between its *teste* and its return.

(b) 8. Edw. 4. 13.
Dyer 175.
C. Eliz. 467.
F. Continuance 3.
(c) 8. Edw. 4. 13.
Dalison 108.
Dyer 175.
Qu. B. Dif. de Pro. 23.
21. H. 7. 16. (d) Dalison 108. 1. R. Abr. 484.

SECT. 87. THIRDLY, *(e)* Where, after issue or demurrer, the Court give the parties a day to a distant Term, without making any continuance to that immediately following.

(e) C. Jac. 236.
Yelver. 169.
21. H. 7. 16.
1. R. Abr. 484. 9. 10.
Com. 1. Bulstrode 144. 3. Bulstrode 233.

SECT. 88. FOURTHLY, Where the Term to which the suit is continued is adjourned, and the suit is *(f)* not adjourned accordingly,

(f) 1. Dan. Abr. 243.
4. Ed. 4. 40.
F. Dif. 27.

SECT. 89. FIFTHLY, Where any of the parties are described in any continuance of the suit, whether on THE ROLL, *(g)* or by *(h)* process, By a name or addition variant from those in the original, &c. though *(i)* only in one letter.

(g) F. Dif. 1. B. Amend. 22.
4. H. 6. 6.
40. E. 3. 18.
(h) F. Amend. 13. 17. 21. 27. 69. 77. Dif. 7. 12. 17. 40. 42. Err. 15. B. Dif. de Pro. 46. Amend. 50. 38. Ed. 3. 22. 39. Ed. 3. 31. 40. Ed. 3. 31. 34. 8. H. 5. 2. 7. H. 4. 27. 9. H. 6. 39. (i) Q. 4. H. 6. 6. B. Amend. 45. F. Amend. 21.

SECT. 90. SIXTHLY, Where, after issue joined, the process is *(k)* not continued from time to time against the jurors, returnable on the same days to which the suit is continued on the roll against the parties.

(k) 21. Ed. 4. 40.
B. Dif. de Pro. 53.
Continu. 82.

Sect. 91. SEVENTHLY, Where (*a*) a joint *venire* is first (*d*) *Qu. 22. H.* awarded for the trial of all the defendants together, and afterwards several *venires* for the trial of each of them. *F. Dif. 11. 6. 3. 4. Vide 7. H. 6. 27.*

Sect. 92. EIGHTHLY, Where (*b*) a *venire* omits part of the issue or issues to be tried, (*b*) *F. Dif. 14. 35. 1. H. 5. 3. Vide B. Dif. de Pro. 63. Qu. C. Eliz. 622.*

Sect. 93. NINTHLY, (*c*) Where a *venire* omits any of the parties, (*c*) *F. Dif. 10. 35. 1. Roll. 22. 3. Bulstrope 311. Winch. 73. B. Amend. 50. 39. E. 3. 22.*

Sect. 94. TENTHLY, Where a juror is named in the *habeas corpora* by a name (*d*) different from that in the panel returned on the *venire*; or where a juror returned on such a panel is wholly omitted in the *habeas corpora*. But in these cases, if the juror so misnamed, or (*e*) omitted, be not sworn at the trial of the cause, it is (*f*) questionable, Whether there be any discontinuance at all? *F. Reple. 4. Amend. 26. 4. H. 6. 7. 8. 19. H. 6. 39. 9. Ed. 4. 13. 27. H. 6. 5. B. Dif. 47. 1. Dan. Abr. 330, 331.*

5. Coke 42. (*e*) *F. Amend. 57. 37. H. 6. 12. B. Amend. 51. (f)* 1. Siderfin 66. 1. Keble 182. 191. 198. 215. 6. Modern 285. *F. Dif. 4.* seem to make it no discontinuance. But 19. H. 6. 39. 34. H. 6. 20. 27. H. 6. 5. *F. Enquest 12. 5. Coke 6. 37. F. Dif. 37. 38. B. Amend. 10, 37. 92. are to the contrary. Vide Cro. Eliz. 586.*

Sect. 95. ELEVENTHLY, Where a *venire* or *distringas* (*g*) *F. Err. 56. 7. H. 6. 28.* are issued without any (*g*) award on the roll to warrant them.

Sect. 96. It (*b*) seems, that before the making of the statutes of 11. Hen. 6. c. 6. and 1. Edw. 6. c. 7. all pleas and processes before justices of assize, gaol-delivery, *oyer* and *terminer*, or peace, or other the king's commissioners, were discontinued by the making a new commission, or association, or by altering the names of the justices or commissioners; but this mischief is fully remedied by those statutes. (*b*) *Vide sup. c. 5. sect 5, 6, 7, 8, 9, 10, 11, 12. Rastal 77.*

Sect. 97. If an (*i*) indictment be removed by *certiorari*, (*i*) *Vide B. Dif. 15. de Pro. 52. 15. Ed. 4. 5. Sup. sect. 64.* after issue joined, and process awarded for the trial; *Qu.* If it shall be discontinued, if not remanded before the return of such process?

As to THE SECOND POINT, viz. Where process is generally said to be discontinued.

Sett. 98. It seems, that wherever an error in process doth not amount to a *discontinuance*, it is generally called a *miscontinuance*. And this seems agreeable to the proper notion of the word; for as a cause may then properly be said to be discontinued, when there is either nothing at all done to continue it, or nothing but what is as to this purpose merely void in law, so it seems to be properly said to be discontinued, where it is continued amiss, or by an (*a*) erroneous and not void continuance. And agreeably hereto, the books which speak of errors in process seem generally to include them all, without (*b*) exception, under the general heads of *miscontinuance* and *discontinuance*. And this, as I apprehend, was also the opinion of the greater part of the court of king's bench in the late case of (*c*) *Widdrington v. Charlton*.

(*a*) Finch 431.
Sup. sect. 89.
21. H. 7. 16.
39. E. 3. 20.
(*b*) 21. H. 7.
16.
B. Dis. de
Pro. 11. 47.
40. 57.
Amend. 17.
C. Jac. 283, 284.

2. Bulst. 142, 143. (*c*) Trin. 11. Annæ, 10. Modern 86.

As to THE THIRD POINT, viz. Where process shall be said to be put without day.

Sett. 99. It seems (*d*) agreed, that by the common law all proceedings upon any indictment, information, or popular action, whereon no judgment had been given, were wholly determined by the demise of the king, and that nothing remained but the indictment or information, original writ, or bill, which were *put without day* till re-continued by re-attachment to bring in the defendants to plead *de novo*. But this is fully (*e*) provided for by 4. & 5. Will. 3. c. 18. and 1. Ann. c. 8. by which it is enacted, "That such process, &c. shall continue in the same force after the king's demise, as it would have had if he had lived."

(*d*) 7. Coke 30.
31.
Cro. Jac. 14.
Moor 748.
2. Hale 189.
489.

(*e*) Sup. c. 1.
f. 12, 13.

Sett. 100. As for appeals, (*f*) I do not find it any where said, that the pleas, and other proceedings therein, being *put without day* by the demise of the king, might not be revived by a special re-attachment, in the same manner as in any other action: However, it is certain at this day, that by force of 1. Edward 6. c. 7. and 1. Ann. c. 8. "neither the writ nor bill, nor any plea, nor proceedings therein, shall be any way discontinued or put without day by such demise."

(*f*) 7. Coke 30.

Seft. 101. It seems to be holden by (a) some, that all causes, whether civil or criminal, are *discontinued*, and by (b) others, who seem to speak more accurately, that they are *put without day*, by the justices, before whom they were depending, not coming on the day to which they are continued, whether such absence were occasioned by (c) death, or any other cause. But it seems to be agreed by all, that a cause so *discontinued*, or *put without day*, cannot be revived without a *re-summons*, or *re-attachment*; which, if they are (d) special, may revive the whole proceedings; but if general, the original record only. Nor do I find that any statute hath remedied this mischief, except in the case of affizes, and *juris utrum*, which are provided for by 1. Edw. 6. c. 7.

28. Affize 42. 30. Affize 39. B. Dif. de Pro. 2. (c) B. Reattachment 18. 4. H. 7. 7. F. N. B. 111. 287. 188. (d) 7. Coke 20. F. Re-attachment 1.

As to THE EIGHTH GENERAL POINT, *viz.* How far errors in process are fatal.

Seft. 102. It seems to be generally taken (e) as an undoubted principle, that a *discontinuance*, by suffering a total chasm in the proceedings, whether on THE ROLL or in the *process*, by not giving a fresh continuance *instantly* upon the determination of the precedent, shall never be aided by an appearance and pleading over. And the Year-Book (f) of 9. Hen. 5. 2. pl. 7. seems to have an opinion, that the misreturn of a sheriff, as where he returns a *cepi* on the award of an *exigent*, is not saved by the defendant's pleading over; but this is (g) questioned by *Staundforde*, and seems contrary to the general tenor of the other (h) books, and contradicted both by (i) *Brook* and (k) *Fitzherbert*, in their abridgment of this very case; and in all probability the book is misprinted; for, as it stands at present, it is hardly sense, or reconcilable with (l) itself.

Vide B. Err. 3. Replead. 2. and Disc. 1. where the contrary opinion is said to have been holden; but this seems not to be warranted by the Case at large in the Year Book. (f) Vide sup. c. 23. *seft.* 343. (g) S. P. C. 169. (h) 5. Coke 45. F. Corone 444. Coke Lit. 325. Salkeld 59. 1. Siderfin 260. 1. R. Abr. 779, 780. Yelverton 158. C. Eliz. 582. C. Jac. 311. See the books cited to the other parts of this section. In 1. R. Abr. 380. notice is taken of three resolutions, that a *capias*, where it lies not, is not aided by an appearance and pleading over, and of a subsequent one contradicting them. (i) B. Restitution 8. (k) F. Cor. 68. But in another part of his book he abridges this case, without taking any exception to it. F. Damage 50. (l) Also it is cited in Yelverton 204. C. Jac. 284. 1. Bulst. 142. for the proof of the contrary opinion.

But if a defendant appearing on erroneous process, expressly except to it before he have pleaded over, there have been many (a) authorities, that he ought to be discharged; and the (b) new process shall issue where the defect first happened. But there is a greater (c) number of authorities to the contrary; by which it appears, that if the original be good, and the defendant present in court, he shall be compelled to answer it, let the process whereon he came in, or the execution of it, be never so erroneous or defective, so that it never were discontinued; for the end of process is to compel an appearance; and that end being served, and a legal charge appearing against the defendant no way discontinued, the law will not so far regard a slip in the process, as to let the defendant out of court in order only to have him brought in again in better form.

(a) 40. Edw. 3. 31. 47. Edw. 3. 14. 18. H. 6. 15. 3. H. 6. 9. F. Replevin 1. Amend. 14. Process 154. Error 82. B. Dis. de Pro. 50. 57. Def. and appearance 11. 1. R. Abr. 779. 3. Mod. 265. But the Year-Book of 8. H. 6. 29. from which the above-cited authority in Brook, Discontinuance, 50. is taken, seems rather to contradict than warrant it. (b) 8. H. 6. 29. 12. H. 6. 18. 18. H. 6. 15. 47. E. 3. 14. B. Dis. de Pro. 11. 50. 57. F. Pro. 127. Dis. 17. (c) 21. H. 7. 16. F. Error 47. 46. E. 3. 30. B. Error 28. Resp. 12. F. Judg. 4. 18. H. 7. 21. Yelverton 158. 1. Siderfin 100. 260. and see the other books under cited.

And therefore where a defendant hath excepted to the process whereon he hath appeared, that he was (d) never served with it, or that (e) no such process lies in the case, or that it bore (f) *teste* before the original, or that it was not awarded into the (g) proper county, or that it was (h) not returnable at a proper day, or that it was (i) directed to one who was no officer, or that it had not so many days as it ought (k) between its *teste* and return, or for any (l) other such like defect, yet he hath been compelled to answer the original.

(d) F. Dis. 36. 9. H. 5. 3. 1. R. Abr. 779. 46. Ed. 3. 30. B. F. Judg. 4. (e) 10. H. 7. 21. 12. H. 4. 18. B. Err. 109. Pro. 173. Jour. 36. 54. 21. H. 7. 16. 8. H. 6. 29. F. Pro. 7. (f) 1. Siderfin 406. (g) 38. E. 3. 20. 29. E. 3. 31. F. Dis. 39. (h) 21. H. 7. 16. Con. 40. E. 3. 31. F. Amendment 14. (i) Cro. Eliz. 482. (k) B. Jour. 36. 54. Dis. 23. Error 169. Amend. 60. F. Jour. 37. 38. 12. E. 4. 11. 9. E. 4. 18. 2. H. 7. 11. (l) F. Dis. 51. 3. H. 4. 10.

And agreeably hereto it was lately (m) resolved, upon great deliberation by the court of king's bench, against the opinion of Mr. JUSTICE POWELL, that the defendant in an appeal of death, coming in upon an *exigent*, which was erroneous for want of the words "*de morte viri, &c.*" had salved the error by his appearance, notwithstanding he had done all he could to take advantage of it, by craving *oyer* of the process, and then demurring.

(m) Wid-
drington v.
Charlton.
T. H. Ann.
10. Mod. 86.
1. Salk. 59.

AND NOTE, That in all the *Year-Books* (a) above-cited (a) Vide to this point, except (b) *brie*, it is said generally, that such errors are salved by an appearance, without any mention or any amendment; but in that one it is said, that they shall (b) be amended.

Sect. 103. Also it seems, that wherever process is awarded (c) *Wide* (c) *instant* from time to time, without any the least break or chasm, and the parties (d) have always a day upon THE ROLL, all other kinds of errors whatsoever that come under the name of *discontinuances*, are (e) salved by an appearance; for there are (f) cases by which it appears, that defendants appearing, and taking exceptions to such errors, have been compelled to answer to the original, which they would not have been, if such original had not been taken to have been *discontinued* by such errors, as they certainly are by an error, in suffering a total chasm in the continuance. And if the original be not *discontinued* by such errors, why should they not be as much salved by an appearance as any of the other errors abovementioned? For would it not be altogether as trifling in this, as in any other case, to dismiss a person only in order to send for him again? And in criminal cases this could not but be of the utmost ill consequence, by giving the defendant, who is actually in the power of the Court, an opportunity of escaping.

Amendment 27. B. Replead. 2. Dif. de Pro. 1. Error 3.

Sect. 104. But it seems agreed by the (g) books, that any other *discontinuance* in the process against jurors, shall have the same effect as a *discontinuance* in suffering a chasm in the process. But it seems that no such (h) *discontinuance*, whether in the process or on THE ROLL, shall in any case *discontinue* or *abate* the original suit. But if it appear before trial, the Court shall cause (i) new process to be awarded where the first fault happened; and if after trial, a new (k) *venire* to have the whole (l) issue tried over again; because the first *venire* was executed, and the whole trial unwarranted. But (m) if judgment be given on a verdict by jurors appearing on a process any way erroneous, it will be totally erroneous; because the trial was wholly unwarranted, and consequently the issue mis-tried.

27. H. 6. 5. and 34. H. 6. 20. (i) 19. H. 6. 39. 34. H. 6. 20. F. Amend. 26. 57. Enquest 18. 29. Edw. 3. 31. B. Amendment 10. Dif. 30. 30. Affize 36. (k) 6. Modern 286, 287. F. Dif. 24. 38. 22. H. 6. 3. 4. (l) 2. H. 5. 3. F. Dif. 35. Vide 9. H. 4. 7. B. Enquest 98. (m) F. Judg. 12. Error 16. 22. E. 3. 2. 7. H. 6. 28. 29. E. 3. 31.

Sett. 105. Also, as I apprehend, any other error in the process against the jurors who actually try a cause will make a (a) *mis-trial* as much as those which are called *discontinuances*; as where such process of this kind is awarded which is not (b) proper in the case, or where it is directed to a (c) wrong officer, or has a (d) wrong *visne*, or (e) *mis-recites* the former process, or is (f) *mis-returned*, or (g) not returned at all, &c. For if errors of this kind have such effect even in civil actions, where they are not within some of the statutes of *Amendments* or *Jeofails*, as it seems to be admitted that they have, it plainly follows, that they must always have it in criminal proceedings, since (b) no such proceedings are within the benefit of any of those statutes. But if an error of this kind, owing wholly to the misprision of the clerk, be discovered before trial, and the amendment of it will set the whole matter right, perhaps it may be (i) amended by the common law. And it hath been (k) holden clearly, that even a *discontinuance* of process may be amended by consent of the parties.

(a) Vide 1. Dan. Abr. 334, 335. 352. 357. 455, 456. (b) 7. H. 6. 29. F. Error 16. (c) 1. Brow. 134. C. Eliz. 574. 486. Moor 356. Yelverton 15. 3. Coke 36. (d) C. Eliz. 468. Vide sup. c. 23. *sett.* 92. 2. D. Abr. 455, 456. 21. Jac. c. 13. 16. & 17. Car. 2. c. 8. (e) C. Jac. 89. (f) C. Jac. 467. 1. Dan. Abr. 354, 355. 357. (g) Vide 21. Jac. c. 13. 1. Dan. Abr. 340, 341. 8. Coke 163. (h) 6. Modern 283. 1. Salkeld 21. (i) L. quint. E. 4. 140. B. Amendment 10. 17. 66. 92. Dif. de Pro. 4. 47. F. Amendment 59. 75. 29. Edw. 3. 32. (k) 21. H. 7. 40. F. Amendment 78.

Sett. 106. Howsoever an error may be so far salved by the party's appearance, that he shall be as much compellable to answer the original, as if there had been no such error: Yet if he were subject to any disadvantage in respect of having such process awarded against him; as to the loss of his goods upon an *exigent*, or to the forfeiture of the privilege of appearance by attorney upon a *pluries*; he (l) shall wholly avoid such disadvantage when such award, which should have caused it, appears to be any way erroneous, whether in respect of a *discontinuance* or *miscontinuance*, or otherwise.

(l) 10. Hen. 7. 21. 12. H. 4. 18. 19. H. 6. 29. 3. H. 4. 10. S. P. C. 184. B. Att. 82. 84. Exigent 10. Summary 271. F. Amendment 27. F. Dif. 40. 28. F. Error 82. But 8. Hen. 5. 2. 43. Edw. 3. 17, 18. 34. F. Amendment 77. B. Appeal 7. seem contrary.

Sett. 107. Also, for the like reason, it seems to be (m) 3. Hen. 7. (m) agreed, that if a man be outlawed, or be condemned by default for not appearing to process which is any way erroneous, he may take advantage of the error in avoid-
F. Error 47. Dif. de Pro. 17. 1. Siderfin 100. 260. B. Restitution 8. B. Amendment 60. 9. Edw. 4. 18.

ance of such outlawry, or other condemnation; for no one shall be condemned barely for not appearing, where that which should have compelled him to appear is defective. But it (a) seems, that a defect in process in an outlawry, may be salved by the defendant's purchasing a pardon, and shewing it to the Court; for that supposes that there was such an outlawry against him as needed a pardon, which if it were erroneous, it would not do.

(a) 3. Hen. 7.
pl. 10.
F. Chart. 25.
F. Discout. 51.

SECT. 108. How far a *discontinuance* of one appeal will be a bar to another, hath been already considered, chap. 23. sect. 132.

CHAPTER THE TWENTY-SEVENTH.

CONTINUED.

OF PROCESS

OF

OUTLAWRY.

AND now I am in the second place particularly to consider the nature of process on a criminal accusation, with a particular regard to process of OUTLAWRY only.

For the better understanding thereof, I shall consider the following points:

1. Whether process of outlawry lies in all criminal cases.
2. In what manner it is to be awarded in general.
3. What is particularly required in the award of it against the PRINCIPAL AND ACCESSARY.

AS TO THE FIRST POINT, *viz.* Whether process of outlawry lies in all criminal cases.

Sett. 109. I take it to be certain, that it lies in all appeals, (a) whether of felony or *mayhem*; in all indictments of treason or felony; on all (b) returns of a rescous; and also in all indictments of (c) trespass *vi et armis*.
 (a) Finch 346. Thelo. b. 1. c. 15. 1. 35. H. 6. 6.
 (b) 13. H. 7. 21. 2. Inst. 665. Con. F. Pro. 56. 213. 29. E. 3. 18. 4. 11. Finch 355. B. Exigent 51. 35. H. 6. 6. 2. Hale 194. (c) 22. Ed. 28. 46.

Also it seems probable, that it lies on an indictment of (d) conspiracy, or (e) deceit, or any other crime of a higher nature than a trespass with *force and arms*, but (f) not on any indictment for a crime of an inferior nature.
 (d) 8. H. 6. 9. F. Pro. 89. B. Exigent 25. 28. 46.
 S. P. C. 172. 192. 22. H. 6. 7. (e) 35. H. 6. 6. (f) Vide 22. E. 4. 11. 35. H. 6. 6. Con. 8. H. 6. 9. Thel. b. 1. c. 15. Dyer 213, 214. See also 4. Burr. 2558.

+ But it has been solemnly determined, that outlawry lies on an Information filed *ex officio* by the ATTORNEY-GENERAL for publishing a libel.
 Wilkes' Case 4. Burr. 2527. 2555.

- (a) 22. E. 4.¹ *Set. 110.* It seems (a) agreed, that process of outlawry does not lie on any action on a statute, unless it be given by such statute, either expressly, as in the case of a (b) *præmunire*, and many other cases; or impliedly, as where a recovery is given by an action wherein such process lay before. And agreeably hereto it hath been adjudged, that it lies not in an action on the statutes of (c) liveries, or of (d) maintenance, nor in (e) *decies tantum*, and that it lay not in a writ of (f) entry on 5. Rich. 2. c. 7. until it was given by 23. Hen. 8. c. 14. but that it lies on a writ of trespass for a (g) *forcible entry* on 8. Hen. 6. c. 9. because the statute expressly gives a recovery by such writ, and such process lies in it by the common law. It seems to be holden in *THE (b) YEAR-BOOK of Henry the sixth*, that it lies on all indictments on statutes; but the contrary is adjudged in (i) 22. Edw. 4. as to the statutes against *forestalling*; and it is there laid down as a general rule, that it lies not on an indictment any more than in an action on a statute, unless it be expressly or impliedly given by such statute.
- (b) 22. E. 4.¹
11.
Con. F. Pro.
89.
22. H. 6. 7.
Qu. B. Exig.
28.
(c) 8. H. 6.
9.
35. H. 6. 6.
B. Pro. 145.
(f) 35. H. 6. 6. F. Pro. 101. B. Pro. 16. (g) B. Exigent 35. 37. H. 6. 23.
7. Keble 563. (h) 8. H. 6. 9. F. Pro. 81. (i) 22. E. 4. 11. B. Exigent 51.
35. H. 6. 6. 37. H. 6. 23. 2. Hale 194. Ld. Raym. 987.

As to *THE SECOND POINT*, viz. In what manner process of outlawry is to be awarded in general, I shall observe the following particulars.

- (k) Finch 351. *Set. 111.* FIRST, That it seems to be agreed, (k) that in every indictment or appeal for any crime under the degree of capital, there must be three *capias's* to the sheriff of the same county wherein the prosecution is commenced, before *the execution* shall be awarded, unless it be after (l) judgment; in which case one *capias* is sufficient.—And (m) *quære*, If three *capias's* be not still necessary in an appeal of rape, as they were at the common law, notwithstanding it be made (n) felony by statute?
- (l) 40. E. 3.
25. F. Exigent 7. 27. Finch 476. (m) 16. Affize 1 3. F. Exigent 10. F. Co. roane 173. B. Pro. 148. Exigent 67. (n) Ch. 23. f. 59, &c.
- (o) S. R. C. *Set. 112.* SECONDLY, It seems to be (o) agreed, that one *capias*, before the award of *the exigent*, hath always been sufficient in an indictment or appeal of death, or high treason. But it seems (p) doubtful whether two *capias's* were not required by the common law in all indictments and appeals of any other felony.
67.
2. Hale 194.
F. Cor. 234.
1. H. 5. 5.
Finch 351.
(p) F. Cor.
184. 234.
22. Affize 97.
6. Modern 85.

Sec. 113. However it is certain, that they are required in all indictments of any other felony, by 25. Edw. 3. ft. 5. c. 14. by which it is recorded, "That if after any man be indicted of felony before the *justices in their sessions, to hear* and *determine*, it shall be commanded to the sheriff to attach his body by writ or precept, which is called a *capias*; and if the sheriff return in the same writ or precept that the body is not found, another writ or precept of *capias* shall be incontinently made, returnable at three weeks after. And in the same writ or precept it shall be comprised, that the sheriff shall cause to be seized his chattels, and to safely keep them till the day of the writ or precept returned. And if the sheriff return, that the body is not found, and the indittee cometh not, the *exigent* shall be awarded, and the chattels shall be forfeit, as the law of the crown ordaineth. But if he come and yield himself, or be taken by the sheriff, or by other minister, before the return of the second *capias*, then the goods and chattels shall be saved."

Two *capias*'s shall issue on an indictment of felony found at *sessions* before the *exigent* shall be awarded.

Sec. 114. It seems to have been the general (a) opinion, that this statute extends to appeals as well as indictments, though it mention only the latter; but that it extends not to any indictment or appeal of death, though it speak of felony in general.

upon which process of outlawry lies. 1. Leonard 100.

+ **Sec. 115.** But it has been held, that this statute does not apply to a court of *oyer and terminer* and gaol delivery, but to justices of the peace in their general and quarter sessions only.

Rex v. Yendall, 4. Term Rep. 358.
2. Hale 195.

+ **Sec. 116.** It seems also that an *alias capias* issued in pursuance of the above statute is good, although it do not contain a command to the sheriff to seize the goods of the defendant.

Rex v. Yendall, 4. Term Rep. 537.
Rex v. Morley, For. 280. 3. Keb. 125.

Sec. 117. THIRDLY, (b) That after the sheriff hath returned a *cepi*, if he have not the body at the day, the Court will not award an *exigent* on the suggestion of an escape, unless the sheriff will return one.

(b) F. Exig. 3. 28. 30.
F. Pro. 226.
8. Hen. 5. 6.
1. Hen. 5. 6.
S. P. C. 70.
F. Exigent 25. 30. Assize 23.

Sec. 118. FOURTHLY, That if there be several appellers, some of which appear, and others make default, those who appear and plead a plea in abatement of the writ, or any such plea in bar as goes to the whole, the suit (c) shall

(c) Sum. 210.
S.

shall be continued against those who make default by *capias* only, and no *exigent* shall issue till such a plea or pleas shall be determined.

(a) F. Exig.

26.

Default 10.

97.

22. E. 3. 11.

30. H. 6. 2.

1. H. 4. 72.

(b) F. Process 4. 34. See Preamble 6. H. 6. c. 1. and 8. H. 6. c. 10. (c) Vide F. Pro. 1. 3. 34. 155. 164. 22. E. 3. 11. 47. Edw. 3. 4. Dyer 295. 30. H. 6. 2. 11. H. 4. 72.

Seft. 119. FIFTHLY, That an *exigent* shall (a) never be awarded to the sheriff of any other county than that wherein the offence is laid; and that by the (b) common law there was no (c) necessity of a *capias* to the sheriff of any other county.

But the law relating to this matter having been altered by several statutes, I shall set forth those statutes in particular, and endeavour to shew how they are to be understood.

On indictments of felony or treason found in the king's bench, two *capias*'s shall issue before the *exigent* is awarded.

Seft. 120. By 6. Hen. 6. c. 1. it is recited, that divers of the king's subjects by false practices, covin, and conspiracy of certain evil persons, had been indicted in the king's bench of divers felonies and treasons, by suspected jurors hired and procured to the same by confederacy and covin of the said conspirators, by force of which indictments a *capias* is awarded to the sheriffs of the county where the said bench is, returnable within two or four days, at which day if the party so indicted come not, an *exigent* is awarded, whereby the goods and chattels of such persons indicted be forfeit to the king; and therefore, to provide a remedy IT IS ORDAINED, "That before any *exigent* be awarded "against such persons indicted in the king's bench of treason "or felony, writs of *capias* shall be directed as well to the "sheriff or sheriffs of the county wherein they be indicted, as to the sheriff or sheriffs of the county whereof they be named in the indictments; the same *capias* having "the space of six weeks at the least, or longer time, by "the discretion of the said justices, if the case require it, "before the return of the same; which writs so returned, "the justices shall proceed in the manner as they had done "before the statute: And if any *exigent* be awarded or any "outlawry pronounced against such persons indicted before "the return of the said writs, the same *exigent*, so awarded, "with the outlawry thereon pronounced, shall be void, and "holden for none."

2. Hale 195.

On indict-

ments in one county against offenders residing in another, an *alias capias* shall issue to take the offender, or to make proclamation in two counties before the return of the writ.

Seft. 121. By 8. Hen. 6. c. 10. it is recited, That divers persons for their private revenge, and not of right, maliciously

ously

ously by subtle imagination had caused and procured many people falsely to be indicted and appealed of several treasons, felonies, and trespasses, before justices of the peace and other commissioners, and justices and others having power to take indictments or appeals in divers foreign counties, liberties, and franchises of *England*, in which the said liege people be not nor at any time were conversant nor dwelling; by force of which indictments and appeals, and the processes upon them made in the said counties, franchises, and liberties so indicted, the said people have been and daily be put in *exigent* and after outlawed, and thereupon their goods and chattels, lands and tenements forfeit, and they in great jeopardy of their lives, whereas the said persons so indicted, appealed, or put in *exigent*, or outlawed, had never knowledge of such indictments, appeals, *exigents*, or outlawries; and therefore it is enacted, "That upon every indictment or appeal, by the which any subject, dwelling in other counties than those where such indictments or appeal shall be taken, of treason, felony, and trespass, before the justices of peace, or before any other, having power to take such indictments or appeals, or other commissioners or justices, in any county, franchise, or liberty of *England*, before any *exigent* awarded upon any indictment or appeal so taken, presently after the first writ of *capias* returned, another writ of *capias* shall be awarded, directed to the sheriff of the county, whereof he, who is so indicted, is, or was supposed to be, conversant by the same indictment, returnable before the same justices or commissioners before whom he is indicted or appealed, at a certain day, containing the space of three months, from the date of the said last writ, where the counties be holden from month to month; and where the counties be holden from six weeks to six weeks, he shall have the space of four months, until the day of the return of the said writ: By which writ of second *capias*, the sheriff shall be commanded to take him which is so indicted or appealed, by his body, if he can be found within his bailiwick; and if he cannot be found within his bailiwick, that the said sheriff shall make PROCLAMATION in two counties before the return of the same writ, that he which is so indicted or appealed, shall appear before the said justices, or commissioners in the county, liberty, or franchise where he is indicted or appealed (a) at the day contained in the said last writ of *capias*, to answer to our Lord the King, or to the party, of the felony, treason, or trespass whereof he is so indicted or appealed. After which second writ of *capias* so served and returned, if he which is so indicted or appealed come not at the day of the same writ of *capias* returned, the *exigent* shall be awarded against such persons indicted or appealed and

(a) The writ therefore must require the person indicted to appear before the justices at the return of the writ, 3. Term Rep. 502.

“ every of them.—And if any *exigent* be awarded upon
 “ any such indictment or appeal against the form aforesaid,
 “ or any outlawry be upon that pronounced, as well the
 “ *exigent* so awarded as the outlawry upon that pronounced,
 “ and every of them, shall be holden for none and void ;
 “ and that the party upon whom such *exigent*, against the
 “ form aforesaid, is awarded or outlawry pronounced, be not
 “ endangered or put to loss of his goods or chattels, lands
 “ or tenements, nor of his life.”

Self. 122. But by 8. Hen. 6. c. 10. f. 4. it is expressly provided, “ That the above recited statute, 6. Hen. 6. c. 1.
 “ concerning process to be made before the king in *his bench*,
 “ stand in force.”

And by 8. Hen. 6. c. 10. f. 5. that this present statute shall not extend to “ indictments or appeals taken within the
 “ county of *Chester*.”

And by 8. Hen. 6. c. 10. f. 6. that “ if any person shall
 “ be indicted or appealed of felony or treason, and at the
 “ time of the same felony or treason supposed, was con-
 “ versant within the county whereof the indictment or
 “ appeal makes mention, the like process be made against
 “ such person so indicted or appealed as was used before.”

Self. 123. By 10. Hen. 6. c. 6. it is recited, that by the clause in the above statute, “ returnable before the same justices or commissioners before whom he is indicted or appealed,” some thought that the writ of *capias* ordained to be directed to the sheriff of the county whereof he that is so indicted or appealed was supposed to be conversant by the same indictment or appeal, shall be returned before the same justices or commissioners, or other before whom the indictment or appeal was taken, and not elsewhere, and therefore to defraud and make frustrate the statutes sued to remove such indictments and appeals out of the hands of the justices or commissioners aforesaid into the king's bench and elsewhere by *certiorari* or otherwise unknown to the party so indicted or appealed, and thereupon sued the process used at the common law, before the making of the said statute, in the king's bench and elsewhere, after such removal; and therefore IT IS ENACTED, “ That the said statute shall be holden and kept, and put in due execution
 “ in all points; AND ALSO that if any such indictments
 “ taken before any justices of the peace, or before any
 “ other having power to take such indictments or appeals,
 “ or other justices or commissioners in any county, fran-
 “ chise, or liberty of *England*, shall be removed before the
 “ king.”

"king in his bench or elsewhere by *certiorari* or otherwise, then after such removing, before any *exigent* awarded upon any such indictment or appeal in the form aforesaid taken, that presently after the first writ of *capias* upon every such indictment or appeal awarded and returned, that another writ of *capias* be awarded, directed to the sheriff of the county whereof he that is so indicted or appealed, is or was supposed to be conversant by the same indictment or appeal, returnable before the king in his bench at a certain day containing the space of three months or four, from the date of the said last writ of *capias*, according to the manner and form that the justices of the peace and other in the said first statute contained ought to have done before such removing after the making of the said statute; AND MOREOVER to make process according to the effect and purport of the said first statute.—And if any such *exigent* be hereafter awarded upon any such indictment or appeal after such removing against the form aforesaid, or any outlawry thereon pronounced, as well the same *exigent* so awarded as the outlawry thereupon to be pronounced, and every of them, shall be holden for none and void, according as in the said first statute is more fully contained."

SECT. 124. It is observable, that it seems to be holden generally in many (a) books, that every outlawry whatever, on an indictment or appeal against a person living in a county different from that wherein the Court sits, is erroneous, if no such *capias*, with a command to the sheriff to make PROCLAMATION, as is given by 8. Hen. 6. c. 10. were awarded to the sheriff of the county wherein the party is supposed to be conversant, before the award of the *exigent*: And there are (b) precedents wherein outlawries in appeals, originally commenced in the king's bench, have been reversed for want of such a *capias*. Yet it seems, that on the other side it may be probably argued, that indictments of treason or felony, originally commenced in the king's bench, are expressly provided for by the (c) statute of 6. Hen. 6. c. 1. which requires, "That a *capias*, having the space of six weeks or more, shall be awarded to the sheriff of the county whereof the inditee shall be named;" and this statute is taken notice of by that of 8. Hen. 6. c. 10. which expressly enacts, "That it shall stand in its full force," and therefore cannot well be imagined to intend either to supersede or repeal it; especially, considering that it begins with "justices of peace," and makes no express mention of the king's bench: And it is a (d) general rule, in the construction of statutes, that where things of an inferior degree are first mentioned, those

(a) 1. E. 4. 1.
19. H. 6. 2.
S. P. C. 67,
68, 69.
Summary 209.
F. Process
103.
39. H. 6. 1.

(b) Rastal 304.
Vide 19. H.
6. 2.
F. Error 26.
Rastal 52.

(c) Sup. f. 120.
2. Hale 195.

(d) 2. Coke 46.
of

of a higher dignity shall not be included under subsequent general words. Also it appears from the preamble of 10. Hen. 6. c. 6. that neither indictments nor appeals, removed into the king's bench by *certiorari*, were within the benefit of 8. Hen. 6. c. 10. before the making of that statute, which expressly provides for indictments and appeals so removed; and there seems at least as good reason, that indictments and appeals originally commenced in the king's bench shall not be taken to be within the benefit of it. To which may be added, that it seems to have been admitted in THE YEAR-BOOK OF (a) 31. Hen. 6. that an appeal originally commenced in the king's bench, is within the equity of 6. Hen. 6. c. 1. and that an outlawry thereon is erroneous, if there were no *capias* containing the space of six weeks directed to the sheriff of the county whereof the appellee is named, as that statute requires; by which it seems to be implied, that such an appeal is not within the 8. Hen. 6. c. 10. but the 6. Hen. 6. c. 1. and that the same is still in force.

(a) 31. Hen. 6.
21.

(b) S. P. C.

Summary 209,
240.

1. Hale 196,

197.

19. H. 6. 2.

31. H. 6. 11.

F. Corone 19.

B. Cin. Ports

22.

Sed. vide 1. H.

6. 10.

(c) Rastal 52.

16. H. 6. 2.

31. H. 6. 11.

Con. S. P. C. 68. F. Process 197. B. Cinque Ports 22. (d) 31. H. 6. 11

(e) S. P. C. 69. Vide Cro. Car. 252, 253.

SECT. 125. It seems to have been (b) agreed, that by force of these statutes, a *capias* shall be awarded into a COUNTY PALATINE, where the defendant is named of any place in such county, in any indictment or appeal. And it seems, that such *capias* shall be directed to, and returned by THE (c) CHANCELLOR of such county. And it hath been (d) said, that if he will not return it, the *exigent* may be awarded, as well as if he had returned it; because the Court cannot compel him to return it; and the prosecution might be unreasonably delayed, if the proceedings were to be stayed till he should return it. But (e) Staundforde makes a *quære*, Whether the court of king's bench may not enforce a return of the writ?

(f) 1. E. 4. 1.

F. Process

103.

Dyer 214.

B. Preciam. 5.

S. P. C. 68.

(g) Sup. c. 25.

1. 70.

(b) S. P. C. 68. F. Process 192. Crompton 132.

SECT. 126. If a defendant be expressly named of the same county wherein he is indicted or appealed, and be also named under an *alias dictus* of another, it hath been (f) adjudged, that there is no need of any *capias*, with a command for proclamation, according to 8. Hen. 6. c. 10. because that which comes under the *alias dictus* is (g) no way traversable nor material. Also if a defendant be named of B. and late of C. there is (b) no need of any *capias* to the sheriff of the county wherein C. lies, because it appears

that

that the defendant is at present conversant at *B.* But if a defendant be named of no certain place at present, but only late of *B.* and late of *C.* and late of *D.* &c. being all of them in counties different from that wherein the prosecution is commenced, a *capias* shall go to the sheriff of (a) every one of those counties. (a) Sum. 210. 2. Hale 196.

Sec. 127. Notwithstanding the words are express, "that any outlawry pronounced contrary to the directions of the statutes shall be void;" yet it seems to be agreed, (b) that it is not to be taken to be utterly void, but only voidable by writ of error. (b) 39. H. 6. 1. B. Utl. 34. Error 16.

19. H. 6. 2. F. Error 26. C. Eliz. 179. 3. Coke 59. Plowden 137. Hob. 166. 1. Burrow 641.

† By the statute 31. Eliz. c. 3. which settles the form of proceedings in outlawry in *civil cases*, IT IS RE- CITED, "that for the avoiding of secret outlawries in actions personal against the queen's subjects having known places of their dwellings, by reason that proclamations are made in the county-courts, and in quarter-sessions, which are places remote from their dwellings, and thereby they have not any convenient notice of such suits against them;" AND ENACTED, "That in every action personal wherein any writ of *exigent* shall be awarded out of any court, in or after the Term of *Easter* next coming, one writ of proclamation shall be awarded and made out of the same court, having day of *teste* and return as the said writ of *exigent* shall have, directed and delivered of record to the sheriff of the county where the defendant at the time of the *exigent* so awarded shall be dwelling, which writ of proclamation shall contain the effect of the same action: And that the sheriff of the county unto whom any such writ of proclamation shall be directed, shall make three proclamations in this form following, and not otherwise; that is to say, one of the same proclamations in the open county-court, and one other of the same proclamations to be made at the general quarter-sessions of the peace, in those parts where the party defendant at the time of the *exigent* awarded shall be dwelling; and one other of the same proclamations to be made, one month at the least before the *quinto exact*. by virtue of the said writ of *exigent*, at or near to the most usual door of the church or chapel of that town or parish where the defendant shall be dwelling at the time of the said *exigent* so awarded; and if the defendant shall be dwelling out of any parish, then in such place as aforesaid of the parish, in the same county, "and Three procla- mations shall be made in every action personal, wherein any writ of *exi- gent* shall be awarded, &c. 31. Eliz. c. 9. Goldsb. 128. 1. H.n. 5. c. 5.

" and next adjoining to the place of the defendant's dwelling; and upon a *Sunday* immediately after divine service and sermon, if any sermon there be; and if no sermon there be, then forthwith after divine service: And that all outlawries had and pronounced after the end of the next *Easter Term*, and no writs of proclamations awarded and returned, according to the form of this statute, shall be utterly void and of none effect; and that the officer, in whose office such writs of *exigent* and proclamation shall be made, shall and may take such fees as by the statute 6. Hen. 8. c. 4. is limited and appointed in that behalf, and no greater fees in any wise: and that the sheriff for making of the proclamation, at or near to the church or chapel door, as is aforesaid, shall have twelve-pence."

Outlawry Br.

34-

A proclamation at the time of the *exigent* in criminal cases, to be delivered three months before return.

† And by the statute 4. & 5. William & Mary, c. 22. f. 4. IT IS RECITED, "that whereas it is agreeable to justice, that proceedings to outlawries in *criminal causes* should be as public and notorious as in civil causes, because the consequences to persons outlawed in criminal causes are more fatal and dangerous to them and their posterities, than in any other causes; AND ENACTED, "That upon the issuing of any *exigent* out of any of their majesties courts, against any person or persons for any criminal matter, before judgment or conviction, there shall also issue a writ of proclamation bearing the same *teste* and return to the sheriff or sheriffs of the county, city, or town corporate, where the person or persons in the record of the said proceedings is or are mentioned to be or inhabit, according to the form of the statute 31. Eliz. c. 3. which writ of proclamation shall be delivered to the said sheriff or sheriffs three months before the return of the same."

And upon these statutes the following points have been adjudged:

Rex v. Barrington, 3. Term Rep. 501.
Rex v. Yendall, 4. Term Rep. 521.

† FIRST, That a *capias cum proclamatione* commanding the prisoner "to appear before the justices at the return of the writ," is erroneous, for it ought to command him to render himself to the sheriff on or before the day when he was exacted, so that the sheriff might have his body before the justices on the return.

Reynolds v. Adams, 1. Term Rep. 378.

† SECONDLY, That the *capias utlagatum* and the sheriff's return to it must be filed with the clerk of the *exigents*.

Rex v. Yendall, 4. Term Rep. 522.

† THIRDLY, That it is sufficient if it appear on the record that the writ of proclamation was delivered to the sheriff three

three months before the return of it, although it be not so expressly alledged.

† FOURTHLY, That in an outlawry after conviction for a misdemeanor in publishing a libel, no proclamation is necessary either by the common law or by the above statutes: and it seems to be the same on an outlawry after conviction in felony.

Wilkes' case,
4. Burr. 2559.
Barrington's
case, 3. Term
Rep. 500.

† FIFTHLY, That in the description of the county court at which an outlaw is exacted, after the words "at my county court" should be added the name of the county; and that after the word "held" should be added "for the county of, &c." naming the county for which the court was held; and therefore where in a record of outlawry in *Middlesex*, the sheriff stated "at my county court," without saying "of *Middlesex*," and that it was "held at the house, &c." without adding the words "for the county of *Middlesex*" after the word "held," the outlawry was reversed: but in a later case (+), on an outlawry for felony, where this objection was taken, viz that in the sheriff's return to the *capias cum proclamatione*, it was only said "in my county court" without adding the name of the county, or shewing that the place where it was held was in the county, it seems to be doubted whether in any return made by a sheriff any technical form of words is necessary. This objection has however prevailed in a great variety of cases: and in cases of outlawry the most scrupulous exactness is still required.

Rex v. Wilkes,
4. Burr. 2564.
and the authorities there
cited.

(+) Rex v.
Barrington,
3. Term Rep.
500.

See 4. Burr.
2564.
5. Term Rep.
204.

† SIXTHLY, That the sheriff must state in his return to the writ of *exigent* the day and year of each exaction; and therefore if such a return state that on such a day "in the thirtieth year of the reign, &c." he exacted the defendant a third time; that afterwards on such a day (omitting the year) he exacted him a fourth time; and that afterwards on such a day "in the thirtieth year aforesaid" he exacted him a fifth time, the outlawry is erroneous; for in a record of outlawry it is necessary to state the year of the king's reign in which every exaction happened; though that is not required in other records.

Rex v. Almon,
5. Term Rep.
202.

2. Roll. Abz.
802.
2. Halc. 203.
Cressles' case,
Hardres 6.

† SEVENTHLY, That if the writ of *capias cum proclamatione* command the sheriff to take the defendant "and have his body before the justices at the general sessions of the peace next after the first of February next ensuing, &c. at which said general sessions of the peace holden for the county aforesaid, to wit on Monday the twenty-fifth day of February, &c.;" and it appears by the sheriff's

Rex v. Barrington,
3. Term Rep.
499.

sheriff's return to the *exigi facias* that the defendant was a fifth time exacted on the twenty-first day of *February* in the same year, the outlawry thereon is erroneous, for he has a day given in court after the outlawry pronounced.

Rex v. Yendall, 4. Term Rep. 521. † EIGHTHLY, That a *capias cum proclamatione* requiring the sheriff to proclaim the party "in open court, in the sheriff's county," without saying "county court," is good; and that in his return to this writ he need not alledge that the persons proclaimed "did not appear and render themselves"; but that in his return to the *exigent* this must be alledged.

Rex v. Yendall, 4. Term Rep. 521. † NINTHLY, That the names of the coroners need not be subscribed to the judgment of outlawry; for it is sufficient if it appear that the judgment was given by them.

Rex v. Yendall, 4. Term Rep. 521. † TENTHLY, That it need not appear that the writs of *capias* or *exigent* were sealed by the justices of *oyer and terminer*.

Rex v. Wilkes & Burr. 2560. † ELEVENTHLY, That where the *exigent* is directed to a sheriff consisting of two persons, as in the county of *Middlesex*, saying in the return that the defendant was exacted "at my county court, &c." it is good.

Rex v. Wilkes & Burr. 2560. † TWELFTHLY, That if the sheriff's return state the place where the county-court was held in the first exaction, he may, in the second, third, fourth and fifth exaction, say "at my court held at the same place, &c."

Rex v. Davis, 1. Burr. 639. † THIRTEENTHLY, It seems also, that the second *capias* issued in pursuance of the 8. Hen. 6. c. 10. must have three or four months between the *teste* and the return, according to the direction of that statute; and that if it appear by the record that this writ had only *fifteen days* between its *teste* and return, the outlawry is erroneous.

Rex v. Davis, 1. Burr. 640. † FOURTEENTHLY, It seems also, that if a *capias cum proclamatione*, issued according to the statute 31. Eliz. c. 3. be *tested* and returned on the same day, the outlawry is erroneous.

As to THE THIRD POINT, *viz.* What is particularly required in the award of process of outlawry against THE PRINCIPAL and THE ACCESSARY.

Stat. 128. It is recited by the statute of Westminster the first, c. 14. "That it had been used in some counties to outlaw persons being appealed of commandment, force, aid, or receipt,

ceipt, within the same time that he which is appealed for the deed is outlawed :” And thereupon it is provided, “ That none be outlawed upon appeal of commandment, force, aid, or receipt, unless he that is appealed of the deed be attained; so that one like law be used therein through the realm: nevertheless he that will so appeal, shall not, by reason of this, intermit or leave off to commence his appeal to the next county against them, no more than against their principals which be appealed of the deed, but their *exigent* shall remain, until such as be appealed of the deed be attained by outlawry or otherwise.”

In the construction of this statute the following particulars seem most remarkable :

Sect. 129. FIRST, That it seems to be (a) agreed, that it extends as well to indictments as to appeals, not only because the word (b) “ appeal” in the statute may, in a large sense, be taken for an accusation in general, but because indictments are certainly as much within the reason of the statute as appeals; and the common law, for the (c) settling whereof this statute was made, did (d) not make any distinction in this respect between appeals and indictments.

(a) Sum. 219.
2. Hale 200.
2. Inst. 183.
S. P. C. 46. 69.
(b) 9. Co. 119.
(c) S. P. C.
44. 46. 69.
(d) Bract.
127, 128.
Britton f. 5.
2. Inst. 183.

Sect. 130. SECONDLY, That it seems also to be (e) agreed, that wherever some of the defendants are expressly charged as principals, and others as accessaries, before the award of this *exigent*, the outlawry thereon of those charged as accessaries, cannot be but traversable; because it appears upon the record, that the *exigent* issued contrary to the directions of the statute. But if several be outlawed on a writ of appeal, which (f) chargeth them all alike, without any distinction, I (g) see not how any advantage can be taken of the appellant’s not having pursued the statute, since it appears not but that he might have charged them all as principals.

(e) 43. E. 3.
17, 18. 34.
44. Affize 16.
Rastal 48.
(f) Sum. 210.
2. Hale 200.
2. Inst. 183.
S. P. C. 46.
70. 148.
(g) Vide
43. E. 3. 17,
18. 34.
44. Affize 16.
B. Appeal 7.
79.
B. Hale Exigent 44. F. Forfeiture 14.

Sect. 131. THIRDLY, That it is holden both by (h) *Staundforde*, (i) *Coke*, and (k) *Hale*, that if an appellant take out the *exigent* at the same time against all the defendants, he must, when they appear, count against them all as principals, and shall be concluded to count against some as principals, and others as accessaries; because he has taken out such process against them which is erroneous, where all are not principals. But granting that an *exigent* taken out

(h) S. P. C.
46. 70.
(i) 2. Inst. 183.
(k) Sum. 210.
2. Hale 200.
The principal authorities in the old books for the maintenance of this opinion seem

to be 7. H. 4. 27. F. Corone 80. 20. E. 3. 7.

at

at the same time against all the defendants, appear to have been erroneous, when by the declaration it appears that some of the defendants are accused only as accessories, and therefore ought not to have had an *exigent* awarded against them, till the principal had been attainted; yet seeing this is only an error in the process to bring in the defendant, and all such errors are saved by an appearance, as the law seems to be now settled, and hath been more fully shewn, sections 107, &c.

(a) See 40. Affize 25. where it appears that persons appealed as accessories, and brought in by *exigent* were still proceeded against as accessories. See also 43. E. 3 1, 18. 35. 44. Affize 16. B. Appeal 7. B. Exigent 44. F. Forfeiture 14. (b) B. Appeal 107. 20. E. 3. 7.

Rex v. Yendall, 4. Term Rep. 521. † But it hath been determined, that if one *exigent* be awarded against the principal and accessory together, it is error only as to the accessory.

(c) 2. Insti- tutio 193. 1. H. H. P. C. 624. 2. Hale 200, 201. Plowden 29. *dubatur* 7. Hen. 4. pl. 36. B Appeal 22. contra. F. "Exigent" 4. *Sic* 132. FOURTHLY, That it seems the better (c) opinion, that where there are more than one principal, the *exigent* ought not to issue till all of them are attainted.

CHAPTER THE TWENTY-EIGHTH.

OF ARRAIGNMENT

IN GENERAL.

HAVING shewn in what manner a person under a criminal accusation is to be brought into court; I shall, in the next place, endeavour to shew in what manner he is to be arraigned or put upon his trial. 2. Hale 216
to 225.
4. Comm. 317.

And this I shall consider,

1. As it relates to all criminals in general;
2. As it relates to PRINCIPAL and ACCESSARIES in particular.

As to the Arraignment of all criminals in general.

Having already shewn in the twenty-fifth (a) chapter, (a) Sect. 15. that regularly the Court will not arraign a man upon an indictment while an appeal for the same crime is depending against him (1);

(1) The Court is not peremptorily bound to suspend the arraignment upon the indictment, but will exercise its discretion according to the circumstances of the case, 4. Coke 45. b. 47. and by the statute of 3. Hen. 7. c. 1. the justices are ordered to proceed to try the prisoner upon an indictment of murder or manslaughter, although the year limited for the appeal is not expired.

I shall here consider only the following particulars:

1. In what manner a criminal is to be arraigned.
2. Whether the omission of it will be error.
3. Where a person shall be arraigned upon several appeals or indictments.

As to the first particular, viz. In what manner a criminal is to be arraigned; I shall observe,

Sect. 1. FIRST, That every person at the time of his arraignment, ought to be used with all the (b) humanity and gentleness which is consistent with the nature of the thing, (b) 3. Inst. 34.
2. Inst. 315.
Mir. c. 5. l. 34.

and under no other terror or uneasiness than what proceeds from a sense of his guilt, and the misfortune of his present circumstances; and therefore ought not to be brought to the bar in a contumelious manner; as with his (a) hands tied together, or any other mark of ignominy and reproach: nor even with fetters on (b) his feet, unless there be some danger of a rescous or escape. It seems indeed to have been holden by (c) some, that this is a particular privilege of persons in holy orders; but it seems the (d) better opinion, that the law makes no distinction in this respect between them and laymen (2).

(a) Bracton

137. p. 3.

Britton 14. 17.

Fleta, l. 1.

c. 31.

(b) Bracton

137.

3. Inst. 34. 35.

Summary 212.

a. Hale 219.

Kelynge 10.

a. Inst. 315.

(c) F. Cor. 432. S. P. C. 133. (d) 3. Inst. 34. 35. Summary 212. Britton 14. 17. Bracton 137. S. P. C. 133. Kelynge 10. 8. Mod. 83.

(2) In Laver's case, A. D. 1722, a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment. 6. State Trials 230. 4. Comm. 322. 8. Mod. 83.

SECT. 2. SECONDLY, That there is no necessity that a

(c) Agreed by all the judges in the Lord Stafford's case. Raymond 408. is all one (3).

(3) This ceremony of holding up the hand is not required in the case of a peer. 4. State Trials 211. 508.

SECT. 3. THIRDLY, That on every indictment the arraignment must be in *English*, by virtue of 37. Edw. 3. c. 15. by which it is enacted, "That all pleas which shall be pleaded in any courts whatsoever, before any of the king's justices whatsoever, or in his other places, or before any of his other ministers whatsoever, or in the courts and places of any other lords whatsoever, within the realm, shall be pleaded, shewed, defended, answered, debated, and judged in the *English* tongue, and entered and inrolled in *Latin*."

But it seems to have been always taken, that appeals are not within this statute, but that they are to be arraigned, and the plea of the defendant to be read, in (f) *French*, in the same manner as anciently. And thus I have often known it done in my own (g) experience; but upon what reason this difference between appeals and all other prosecutions is grounded, I have never heard.

(f) 1. Sid. 324.

2. Jones 210.

C. Eliz. 69.

1. Salkeld 61.

(g) As in the

case of Smith

and Bowen,

Mich 7. Ann. and that of Widdrington and Charton, Trin. 11. Ann. 10. Modern 86. and that of Reeve and Trundal, Pas. 3. Geo. 1.

† Now by 4. Geo. 2. c. 26. explained by 6. Geo. 2. c. 6. and 14. "All proceedings whatsoever in any courts of justice in England, and in the court of exchequer in Scotland which concern the law and administration of justice, shall be in the English tongue and language only, and not in Latin or French, or any other tongue or language whatsoever."

Secl. 4. FOURTHLY, (a) That an appeal in the king's bench ought to be arraigned on THE PLEA-SIDE, unless it come in by *certiorari*, in which case it is said, that it ought to be arraigned on THE CROWN-SIDE. (a) 2. Jones 210. 1. Siderfin 324. 1. Salkeld 62.

Secl. 5. FIFTHLY, That where a writ of appeal is abated, the prisoner shall not (b) be arraigned on the count at the suit of the party, because the count depends upon the writ, and that being determined, all (c) falls to the ground. Yet it seems certain, that if the writ were good, the appellee may in many cases be arraigned at the suit of the king upon the count, as hath been more fully shewn, chapter twenty-three (†). (b) Style 7. (c) B. App. 44. 4. H. 6. 16. Sup. c. 23. f. 10. (†) Section 6 to 14.

As to the second particular, *viz.* Whether the omission of an arraignment will be error.

Secl. 6. It is said in the third (d) Modern Report, that an attainder of high treason was reversed for this and other errors. Neither do I find any precedent of an attainder in Coke's Entries, on an indictment of (e) treason or (f) felony, in which it is not expressed either in these words, "ad harram hic ductus in propria persona sua committitur mareschalle, &c." "et statim de premissis," in case of felony, or "de altis proditionibus," in case of high treason, "ei superius impositis allocutus qualiter se velit inde acquietare dicit, &c." or in words (g) tantamount: and therefore it is certainly safest to express it in every record of such attainder, where the party appears and is condemned, whether upon confession or verdict, or standing mute, &c. Yet I find it wholly omitted in every attainder upon an (h) appeal in Coke's Entries, and much oftener (i) omitted than expressed (k) in such attainders in Rastal. (d) 3. Mod. 265. Raymond 408. 2. Hale 217, 218. (e) Co. Ent. 360, 361. (f) Co. Ent. 352. 354. 355. 356. 358. 360. (g) Rastal 42. (h) Co. Ent. 53 to 60. (i) Rastal 47 to 45. 47. 52. (k) Rastal 42. 53.

As to the third particular, *viz.* Where a person shall be arraigned upon several appeals or indictments.

Secl. 7. It seems, that by the common law, if a man be appealed of divers robberies at the suit of divers persons, he may be severally (l) arraigned on each appeal, and then severally tried on each, that each appellant may be equally intitled to the restitution of his goods, upon the conviction of the appellee. (l) 4. F. 4. 11. Summary 212. S. P. C. 66. 107. 160. F. Corone 26, 27.

And in like manner at this day a person charged with several (a) indictments of robbery at the prosecution of several persons, may be severally arraigned and tried on each indictment; because the prosecutor, since the statute of 21. Hen. 8. c. 11. is intitled to a restitution of his goods upon a conviction of such an indictment, in the same manner as the plaintiff is upon a conviction in an appeal.

(b) S.P.C. 66. And it is holden both by (b) *Staundforde* and (c) *Hale*, that even a person attainted of robbery at the suit of one person, may be arraigned and tried at the suit of another, if such suit were commenced before the attainder: But *quære*; for of the authorities cited for the maintenance of this opinion, two (d) seem to be directly against it; and the (e) other, which seems most to the point, does not come up to it.

(d) F. Cor. 379. 7. H. 4. 31. Ab. F. Cor. 81. (e) 4. Edw. 4. 11. Ab. F. Corone 26, 27. See 44. E. 4. 44. Ab. F. Co. 95. See also c. 23. f. 53. and the chapter concerning the plea of Autrefois Convict and Attaint.

(f) S.P.C. 66. *Sett.* 8. It is made a *quære* by (f) *Staundforde*, whether a prisoner before his attainder shall answer to divers appeals of death or rape, in the same manner as in case of robbery?

CHAPTER THE TWENTY-NINTH.

OF THE

PRINCIPAL AND ACCESSARY.

AND now I am in the second place to consider the nature of ARRAIGNMENT, so far as it particularly relates to PRINCIPALS and ACCESSARIES.

1. Hale c. 55
and 56.

4. Com. c. 3.
Foster Disc. 3.

For the better understanding whereof, it may not be improper to consider,

1. In what cases, in judgment of law, a man shall be said to be a *principal*, and in what cases he shall be said to be an *accessary*.

2. Where he shall be adjudged an accessary before the fact.

3. Where an accessary after the fact.

Sect. 1. AND FIRST, For the better understanding in what cases a man shall be said to be a *principal*, and in what an *accessary*, having premised, that where a felony is committed by divers persons, the (a) same man may be a principal and accessary in it, and so charged in the (b) same indictment or appeal; as where A. commands B. to kill C. and afterwards actually joins with him in the fact: And having also farther premised, that it is agreed by all the books, that the man may be an accessary after the fact, by (c) receiving one who was an accessary before, as well as by receiving a principal; and that there seems to be the same (d) reason, that a man may be an accessary before the fact, by procuring another to be in such manner an accessary to the principal:

(a) Sum. 219.

3. Inst. 139.

Keilway 107.

F. Corone 80.

(b) 7. H. 4.

27. F. Corone 80.

176. 284.

(c) Lamb. b. 2.

c. 7. f. 291.

26. Affize 52.

B. Corone

104.

F. Corone

196.

Crompton 42. S. P. C. 43. (d) See the books above cited, and Summary 219.

I shall endeavour to shew,

1. In what offences there can be no accessaries, but all must be principals, if any way guilty.

2. Where those who only abet a fact, shall be esteemed as much principals in it as those who actually do it.

3. Where those who are actually absent when a fact is committed may be esteemed principals in it.

4. Where one shall be adjudged a principal in an offence against a statute.

5. Whether the offence of an accessary can ever rise higher than that of the principal.

As to the first particular, *viz.* In what offences here can be no accessaries, but all must be principals, if any way guilty.

Post 341. *Sec.* 1. It seems to have been always an uncontroverted maxim, that there can be no accessaries in (a) *high treason*, or (b) *treasons*.
 (a) 3. *Inst.* 20, 21. 138. *Dalison* 16. *Summary* 215.
 1. *Hale* 613. 12. *Coke* 81, 82. 2. *Inst.* 183. B. *Treason* 19. 3. *H.* 7. 10.
 F. *Corone* 55. 19. *H.* 6. 47. S. P. C. 3. 40. B. *Cor.* 135. *Dalton* c. 108.
 Crompton 42. *Coke* *Litt.* 57. (b) 12. *Coke* 81, 82. 2. *Inst.* 183. B. *Rape* 3.
Coke *Litt.* 57. 1. *Hale* 613.

Also it seems to have been always agreed, that whatsoever will make a man an accessary before in felony, will make him a principal in (c) *high treason* and *trespass*; as (d) *battery*, (e) *riot*, *route*, (f) *forcible entry*, and even in (g) *forgery* and (h) *petit larceny*. And therefore, wherever a man commands another to commit a *trespass*, who afterwards commits it in pursuance of such command, he (i) seems by necessary consequence to be as guilty of it, as if he had done it himself. From whence it follows, that being, in judgment of law, a principal offender, he may be
 (c) 19. *H.* 6. 47. B. *Treason* 9. F. *Corone* 8. 3. *Inst.* 1. 8. (d) 38. *Affize*. *Keilway* 55. (e) *Co. Litt.* 57. (f) B. 1. c. 64. 1. 22. *Co. Litt.* 57. F. *Gard.* 99. (g) *Moor* 666. 1. *Siderfin* 312. (h) *C. Eliz.* 750. 2. *Inst.* 183. 12. *Coke* 81. *Con. Summary* 223. 1. *Hale* 616. (i) *Moor* 757. *Summary* 217. *Plowden* 475. *Vide infra* section 7. F. *Cor.* 314. 433. S. P. C. 45. *Qu. Moor* 53.

tried and found (a) guilty before any trial of the person (a) B. Tref. who actually did the fact (1).

256.

1. Levinz 124.

29. Affize 59. F. Affize 291. Con. 27. Affize 4. Qu. Vaugh. 115, 116.

(1) This rule requires distinction. In that species of treason touching the death of the king, &c. every *accessorial agency* is, independently and in its own nature, a complete overt act of compassing; and renders the offender guilty, though the fact itself should never be attempted. But in *every* other species of treason, the accessorial offence is of a derivative kind; some *act* must be done, to which *act* the offender must be accessory, and out of which his guilt must spring, before he can be converted, by this rule of law, into a principal offender. It seems therefore, that although in the event of the prosecution such an offender may be considered as a principal, yet in his progress towards conviction he ought, from a principle of natural justice, to be considered merely *as in the nature of an accessory*, before or after the fact; as if under such a consideration he were tried before the person who *actually did the fact*, the absurdity might follow, that the accessorial agent may be convicted, and the principal who did the act, and on whose guilt the offence of the accessory must alone depend, may be acquitted. Foster 341 to 347. and 1. Hale 613. 2. Hale 223.

Sect. 3. It was formerly a (b) question, whether the (b) Dyer 296. same receipt of an offender, which will make the receiver 12. Coke 81, an accessory after the fact in the case of felony, will make 82. him a principal in high treason, as it seems to be (c) fet- 3. Inst. 138. tled at this day that it will? For if it should be adjudged Dalt. c. 89. a misprison only, as (d) some have contended, a man 108. would be subject to a less punishment for receiving a traitor than for receiving a felon; for he who receives a felon is certainly liable to judgment of death, as being an accessory to the felony, but he who receives a traitor would be liable only to fine and imprisonment, as being guilty of a misprison only.

Crompton 42.

3. H. 7. 10.

S. P. C. 3.

(c) Sum. 215.

3. Inst. 138.

Dalton c. 108.

Crompton 42.

Sup. f. 2. and

B. 1. c. 10.

f. 3, 4.

S. P. C. 3. B. Treason 19. B. Corone 135. (d) Dyer 296. 21.

Sect. 4. It seems (e) agreed, that whosoever agrees to a (e) C. Eliz. 824. trespass on lands or goods done to his use, thereby becomes a principal in it; but that no one can become a principal in a trespass on the person of a man by any such agreement. Also it seems (f) agreed, that no one shall be adjudged a principal in any common trespass, or inferior crime of the like nature, for barely receiving, comforting, and concealing the offender, though he know him to have been guilty, and that there is a warrant out against him, which by reason of such concealment cannot be executed. And if he cannot be punished as a principal, it is certain that he cannot be punished as an accessory; because in such offences, all who are punished as partakers of the guilt of him who did the fact, must be punished as principals in it, or not at all. Yet if a man knowing that there is a warrant against such offender,

824.

38. Affize 9.

B. Disseis. 98.

B. Ejeq. Cuf-

todie 8.

B. Tref. 256.

38. E. 3. 18.

Co. Lit. 180.

F. Gard. 89.

(f) Poph. 134.

2. R. Abr. 75.

(a) a. R. Ab. offender, advise and persuade him to absent himself, (a) perhaps he may be indictable for a contempt of the law in hindering the due course of justice.

Sec. 5. It is certain, that in (b) petit treason, and also in such felony as shall have (c) judgment of death, there may be accessaries both before and after the fact, who must be proceeded against as such, and not as principals, as shall be more fully shewn in the following part of this chapter.

(b) Dalif. 16. 3. Inst. 10, 21. Crompton 42. S. P. C. 40. B. 1. c. 32. f. 5, 6. (c) 12. Coke 81, 82. C. Eliz. 750. 2. Inst. 183.

(d) See the citations to the next letter. Also it seems, (d) that there may be accessaries before the fact in *mayhem*, but that the appellant hath his (e) election to proceed against them either as principals, or as accessaries (f). But I find it no where holden, that there can be accessaries in *mayhem* after the fact.

(e) Sup. c. 23. f. 19. 22. Affize 82. F. Corone 11. 182. 215. 221. Con. 40. Affize 1. B. Appeal 71. 154. (f) Sup. f. 4. 1. Hale 613.

(g) S. P. C. *Sec. 6.* I do not find it agreed, (g) whether there can be any accessaries in *præmunire*?

44. Dalton c. 108. B. Præmunire 4. 6. Plowden 697. 1. Hale 13.

As to the second particular, viz. Where those who only abet a fact shall be esteemed as much principals in it as those who actually do it.

(b) Plowden *Sec. 7.* It seems to have been (b) anciently the more prevailing opinion, that those only were to be adjudged principals in felony who actually did the fact; as in murder, those only who gave the mortal blow; in rape, those only who actually ravished the party, &c. and that those in the company who were only present and abetted and encouraged the doing it, were to be esteemed accessaries; or at most principals in the (i) second degree only.

41. 44. Edw. 3. 38. See Brañt. b. 3. c. 12. f. 10, 11. 13. C. 19. f. 11. C. 21. f. 8. 10, 11. Lamb. b. 2. c. 7. f. 283. Statute of Westminster 1. c. 14. Con. F. Cor. 433. (i) Plowden 97. Foster 347.

(k) 11. H. 4. But I take it to be settled at this day, that all those who assemble themselves together with a felonious intent,

F. Cor. 86. (k) assemble themselves together with a felonious intent, 228. B. Appeal 32. Moor 53. 9. Coke 67. Kelynge 47. Plowden 98. 4. Coke 42. See the cases cited to the other parts of this and the next section, and Bk. 1. c. 31. 1. 31. c. 32. f. 5. and c. 41. f. 6.

the execution whereof causes either the felony intended, or any other to be committed, or with an intent to commit a (a) trespass, the execution whereof causes a felony to be committed, and continuing together abetting one another till they have actually put their design in execution; and also all those who are (b) present when a felony is committed, and abet the doing of it; as by holding the (c) party while another strikes him, or by (d) delivering a weapon to him that strikes, or by moving (e) him to strike, are principals in the highest (f) degree, in respect of such abetment, as much as the person who does the fact, which in judgment of law is as (g) much the act of them all, as if they had all actually done it; (h) and if there were malice in the abettor, and none in the person who struck the party, it will be murder as to the abettor, and manslaughter only as to the other.

(a) Bk. 1. c. 31. f. 46. Summary 216, 217. F. Corone 60. 314. 350. 433. B. Corone 172. Keilw. 161. Kelynge 47. Salkeld 334. S. P. C. 40. (b) See B. 1. c. 32. f. 6. Moor 53. 2. Institute 182. 3. Institute 138. 59.

B. Appeal 19, 132. B. Cor. 19. 167. 188. S. P. C. 40. 44. 41. 10. E. 1. 14. Summary 215, 216. F. Cor. 99. 309. 433. Dalton c. 108. Lamb. b. 2. c. 7. f. 283. 7. H. 4. 27. Presence holden not to be necessary for this purpose. F. Cor. 60. 4. H. 7. 18. (c) Summary 216. F. Cor. 135. S. P. C. 40. 13. H. 7. 10. (d) Summary 216. 2. Inst. 41. 82. (e) F. Corone 60. S. P. C. 40. Summary 216. 4. H. 7. 18. B. Corone 141. B. Appeal 85. (f) Summary 215, 216. Plowden 98. Sup. c. 23. f. 76. c. 25. f. 64. and see the case of Rex v. Syms and Merryweather, Foster c. 1. (g) Plowden 98. 100. F. Corone 60. B. Corone 141. B. Appeal 85. 4. Hen. 7. 13. 9. Coke 67. (h) B. 1. c. 31. f. 49. 54.

SecT. 8. It doth not seem necessary to the making an abettor a principal, that the person on whom the felony is committed should be under any (i) terror from the abetment, and by reason thereof discouraged from making that defence which otherwise he might have made. But it seems to be sufficient for this purpose, that the person who does the fact is encouraged and emboldened in it from the hopes of present and immediate assistance from the abettor, whether he be within view of the fact, or (k) not.

(i) But this seems required in Plowden 98. (k) F. Cor. 60. Summary 216, 217.

4. H. 7. 18. Salkeld 334, 335. B. 1. c. 35. f. 7. and c. 38. f. 8.

And upon this ground it hath been adjudged, (l) that where persons combined together to stand by one another in the breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals, though at the time of the fact some of them were at such a distance as to be out of view.

(l) See B. 1. c. 31. f. 46. Summary 216, 217. B. Corone 172. Salkeld 334, 335. Keilway 161. F. Corone 60. Kelynge 47.

314. 350. 433. S. P. C. 40. Vide

Also

(a) B. 1. c. 34. Moor 53. S. P. C. 40. Also upon the same reason it hath been adjudged, (a) that where a company of rogues assault a man in the highway, who escapes from them, and then one of them rides from the rest, in the same highway, and robs another out of the view of his companions, and then returns to them, they are all of them equally principals.

(b) B. 1. c. 38. f. 8, 9. 11. H. 4. 13. 30. Moor 53. And the like hath been (b) adjudged in relation to all those who accompany one another with an intent to commit a burglary, in the execution whereof some stand to watch only in the adjacent places, and the rest actually break and enter the house.

(c) Keil. 161. *Sett.* 9. But (c) where divers persons accompany one another in the doing of a lawful act, and one of them happens to kill a man, he that gives the wound is only guilty of the homicide, and the rest of the company shall neither be esteemed principals nor accessaries.

(d) Kelnige 47. Also if the act intended, (d) though unlawful, were a bare trespass, and one of the company be guilty of larceny, it is a felony in such offender only, because it is a crime of a nature entirely different from that intended, and not caused by the execution of it.

Sett. 10. Also those who by accident are barely present when a felony is committed, and are merely passive, and neither any way encourage it, nor endeavour to hinder it, nor to apprehend the offenders, shall (e) neither be adjudged principals nor accessaries; (f) yet if they be of full age, they are highly punishable by fine and imprisonment for their negligence, both in not endeavouring (g) to prevent the felony, and in not endeavouring (h) to apprehend the offender. And (i) if they any way shewed an assent to the felony, it seems that they may be punished as principals in it; because the shewing such an assent could not but give encouragement to it.

(e) S. P. C. 40. Summary 216. F. Corone 92. 197. 395. B. Indictment 5. 14. H. 7. 11. Con. F. Cor. 314. 197. Lamb. b. 2. ch. 7. f. 289. Vide sup. c. 23. f. 66. (f) S. P. C. 40. F. Corone 395. (g) Noy 50. Dalton c. 108. (h) Sup. c. 12. section 1, 2, 3, 4. (i) Vide infra section 15. S. P. C. 40. Summary 217. F. Corone 115. Dalton c. 108. Lamb. b. 2 c. 7. f. 282. My Pleas of the Crown, b. 1. c. 20. section 3. But F. Corone 92. and Crompt. 41. seem contrary.

As to the third particular, viz. Where those who are actually absent when a felony is committed, may be esteemed principals in it.

Sett. 11. I take it to be a settled rule, that where-ever a man procures a felony to be committed, and is absent at the time

time when it is committed, and no other person but himself can be adjudged a principal in it, he shall be esteemed as much a principal as if he had been present. For no one can be (a) punished as a felon, but either as a principal or as an accessory; and therefore where the procurer of a felony cannot be punished as an accessory, because there is no other to whom he can be an accessory, he must be punished as a principal, or not at all.

And upon this ground it seems to be clear, that if a man (b) persuade another to drink a poisonous liquor under the notion of a medicine, who afterwards drinks it in his absence (c); or if A. intending to poison B. put poison into a thing and deliver it to C. who knows nothing of the matter, to be by him delivered to B. and C. innocently deliver it accordingly in the absence of A.; or if one (d) incite a madman to kill another, who afterwards kills him in the absence of the person that incited him; in all these and the like cases, the procurer of the felony is as much a principal as if he had been present when it was done. And so (e) likewise all those seem to be, who were present when the poison was infused, and privy to, and consenting to the design.

(b) 4. Coke 44.
(c) 2. Inst. 183.
(d) 2. Hale 435.
(e) Sum. 216.
615, 616.
Pulton 122.
Dalton c. 108.
9. Coke 81.
3. Inst. 138.
(c) Sum. 218.
9. Coke 81.
Kelynge 52.
53.
(d) See B. 1.
Summary 216.

But (f) those who only abetted the crime by their command, counsel or advice, but were absent when the poison was infused, are accessories and not principals.

Also if A. intending to poison B. deliver a poisonous thing to C. to be by him delivered to B. and C. knowing it to be poisoned deliver it to B. in the absence of A.; in this case C. (g) only is a principal in the felony, and A. an accessory.

SECT. 12. By force of 3. Hen. 7. c. 2. all those who are accessories before to the forcible taking away of a woman, made felony by that statute, whether they were present or absent at the time of the taking, or accessories after, by wittingly receiving the woman so taken away, shall be punished as (h) principals. But this depends on the express words of the statute, and not on any construction from the reason of the common law.

As to the fourth particular, viz. Where a man shall be adjudged a principal in an offence against a statute.

SECT. 13. It seems to have been always generally agreed, that notwithstanding all penal statutes are to be construed strictly

(f) 4. Coke 44.
Crompton 44.
(g) Kely. 52.
53.
Foster 349.
(h) See B. 1.
c. 42. sect. 8, 9.
and Sum. 217.
1. Hale 614.

(e) S. P. C. 44. ly (a); yet where-ever a statute ordains, that those who are guilty of the thing prohibited by it, shall be adjudged traitors or felons, it, by a necessary implication, makes all the procurers and abettors of it principals or accessaries before, upon the same circumstances which will make them such in a treason or felony at common law; because such persons may properly be said to have done the thing in such a manner caused by them, and consequently to come within the very words of the statute. And therefore it seems to have been generally unquestionable, that those who procure the (b) clipping of the king's coin, or other offence made high treason by statute, in such a manner as will make them principal traitors in a treason at common law, shall be adjudged principal traitors by the statute; and that those who abet a (c) petit treason, or a felony by statute, as a (d) rape, or (e) buggery, &c. shall be adjudged principals if present when it was committed, and accessaries if absent, in the same manner as in felonies at common law, unless the statute expressly provide otherwise; as that of 3. Hen. 7. c. 2. does, as hath been shewn in the foregoing section.

(c) B. 1. c. 32. section 5, 6. (d) Summary 187. 215. B. 1. c. 41. f. 6. S. P. C. 44. 11. H. 4. 13. Dalison 22. F. Corone 86. 215. B. Rape 2, 3. (e) 3. Inst. 59. Summary 215. B. 1. c. 38. section 18. Vide Foster 355, 356.

(f) S. P. C. 44. *sect. 14.* But there (f) seems to have been formerly some opinions, that the receivers of a felon by statute, shall not be adjudged accessaries to the felony after the fact, in the same manner as the receivers of a felon at common law, because such persons can in no propriety of speech be said to have done the thing prohibited, as the procurers of it may be said to have done.

(g) S. P. C. 44. But this seems (g) to have been more strongly holden in respect of those statutes which expressly provide that accessaries before to the offence prohibited, shall be punished as felons, &c. but say nothing of accessaries after; from which words it may be argued; that they must be either intended to exclude accessaries after the fact, or have no manner of effect.

Yet I take it to be settled at this day, that in these and (h) Sup. sect. 3. all other cases where a statute makes any offence (b) treason, or (i) felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason or felony at common law, unless there be an express exemption.

(h) Sup. sect. 3. B. Treason 19. S. P. C. 3. 3. H. 7. 10. (i) Sum. 215. Dalison 22. Lamb. b. 2. c. 7. f. 284, 285. 3. Inst. 45, 51. 72, 73.

prefs provision to the contrary. For since it is agreed, that such new treason or felony shall have the same construction with a treason or felony at common law to all other (a) intents and purposes; why should it not also have the same in relation to those who are to be esteemed principals and accessaries in it? And as to the objection, that the receivers of the offender cannot thereby be so properly said to have done the offence, as the accessaries before it may be answered, that they may properly enough be said to be partakers in the guilt of the offender; and what crime such a partaking shall be adjudged to amount to, is most reasonably determined by the rules of law in other cases of like nature. And as to the objection, that a statute by expressing accessaries before, must be intended to exclude accessaries after, or to have no manner of effect, it may be answered, that nothing is more common than for statutes to express those things which the law would have implied; in which cases it seems a very reasonable construction, that *expressio eorum quæ tacite insunt nihil operatur*.

(a) See B. 1, c. 40. sect. 4. Sup. c. 18. sect. 13. S. P. C. 168. Summary 230, 231.

As to the fifth particular, *viz.* Whether the offence of the accessory can ever rise higher than that of the principal.

SECT. 15. I take it to be an uncontroverted (b) rule, that it never shall; it seeming incongruous and absurd that he who is punished only as a partaker of the guilt of another, should be adjudged guilty of a higher crime than the other. And therefore it seems clear, (c) that if a wife or servant cause a stranger to murder the husband or master, and are absent when the murder is committed, they cannot be said to be accessaries to petit treason, but to murder only, because the offence of the principal is but murder. But if such wife or servant had been (d) present when the murder was committed, they would have been guilty of petit treason, and the stranger of murder; because in respect of such (e) presence they would have been principals in killing, as hath been more fully shewn, Book the first, in the chapter of Petit Treason, section the sixth.

(b) 3. Inst. 20. 139. Summary 215. B. Corone 119. Vide Keil. 34. and infra f. 21, 22. (c) 3. Inst. 20. Dalison 16. Dyer 254. 3. 332. 128. Summary 24, 25. 215. Crompton 19. B. Corone 119.

But 40. Affize. 25. whereof this note in Brook is an abridgement, seems contrary. See also F. Corone 216. which is an abridgement of the same case. (d) 3. Inst. 20. Summary 24, 25. 1. Hale 615. Dyer 128. 254. 332. Crompton 19. Moor 91. Dalison 16. (e) Vide sup. f. 7.

As to THE SECOND POINT, viz. In what case a man shall be adjudged an accessary before.

- (a) 1. Inst. 182. *Scff.* 16. It seems to be (a) agreed, that those who by hire, command, counsel or conspiracy, and it seems to be generally (b) holden, that those who by shewing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far (c) absent when he actually commits it, that he could not be encouraged by the hopes of any immediate help or assistance from them, are all of them accessaries before the fact, both to the felony intended, and to all other felonies which shall happen in and by the execution of it, if they do not (d) expressly retract and countermand their encouragement, before it is actually committed.
- (b) 2. Inst. 182. Dalton c. 108. Lamb. b. 2. c. 7. S. P. C. 40. Crompton 41. Summary 217.
- (c) 2. Inst. 182. Dalton c. 108. Lamb. b. 2. c. 7. Plowden 475. Con. Crompt. 41.
- (d) Vide sup. f. 7. S. P. C. 40. B. Appeal 19. B. Corone 188. (d) 3. Inst. 51. Crompton 42. Summary 217, 218. Lamb. b. 2. c. 7. f. 289. Dalton c. 108. 1. Hale 337. Foster 354. Plowden 475, 476.

- Scff.* 17. But it doth not seem necessary in any indictment or appeal against a man as accessary before the fact, to set forth the special manner by which he abetted it, but only to charge him (e) generally, *quod felonice, &c. abbet-tavit, incitavit, et procuravit, &c.* Also the like general way of setting forth the aid given to a felon, seems to be sufficient both as to those who are (f) principals by being present when the felony is committed, and also as to those who are (g) accessaries after.
- (e) Co. Ent. 56, 57. Rastal 51. F. Corone 433. seems somewhat contrary.
- (f) 4. Coke 41. Coke Ent. 57. (g) Coke Ent. 56. Rastal 48, 52.

- Scff.* 18. It cannot be doubted, but that if a man advise a woman to kill her child as soon as it shall be born, and she kill it in pursuance of such advice, he is an (h) accessary to the murder, though at the time of the advice, the (i) child not being born, no murder could be committed of it; for the influence of the felonious advice continuing till the child was born, makes the adviser as much a felon as if he had given his advice after the birth.
- (h) Dyer 186 3. Inst. 51. Dalton c. 108. Lamb. b. 2. c. 7. Crompton 41. 1. Hale 617.
- (i) See B. 1. c. 3. f. 16, 17.

- Also it seems (k) agreed, that if I command another to beat a man, and he beat him in such a manner that he dies thereof, I am an accessary before to the felony, (l) because it happened in the execution of a command which naturally tended to endanger the life of the other. And (m) *a fortiori* therefore it follows, that if a man command
- (k) Sum. 217. Plowden 475. Lam. b. 2. c. 7. 1. Hale 617.
- (l) S. P. C. 41. F. Corone 314. Vide Plow. 475. Dalton c. 108. Crompton 41. (m) Plowden 475.

another

another to rob a man, and he in robbing him kill him ; or to burn the house of *J. S.* and he by burning it, burn also the house of *J. N.* ; the commander is as much an accessory to the subsequent felony as to that which was directly commanded.

Also it is said, (*a*) that if I command a man to rob another, and he kill him in the attempt, but do not rob him, I am guilty of the murder, because it was the direct and immediate effect of an act done in execution of my command to commit a felony.

(*a*) *Plow.* 475.
Dalton c. 108.
Lamb. b. 2.
f. 286.
Crompton 42.

But if I persuade *A.* to poison *B.* and *A.* accordingly give poison to *B.* who eats part of it, and gives the rest to *C.* who is killed by it, I am guilty of a great misdemeanor only in respect of *C.* but not (*b*) an accessory to his murder, because it was not the direct and immediate effect of the act done in pursuance of my command, but happened accidentally through the act of *B.* to which I being no way privy, cannot be made accessory by reason of it. Yet in this case *A.* is certainly guilty of the murder of *C.* as hath been more fully shewn, Book the first (†).

(*b*) *Plowden*
474, 475.
Dalton c. 108.
Lamb. b. 2.
c. 7. f. 288.
Crompton 42.
(†) *Ch. 31.*
f. 42.

Sec. 19. It seems to be holden generally in some (*c*) books, that where-ever a felony ensues and follows upon any unlawful act commanded by another, and executed in the same manner as it was commanded, the commander is an accessory to the felony. But this (*d*) seems to be too large a rule, and liable to great difficulties, unless limited by some distinctions.—But finding little in the books concerning this matter, I shall leave it to be farther considered by others.

(*c*) *Plow.* 475.
Moor 437.
Dalton c. 108.
3. Inst. 51.
(*d*) *S.P.C. 41.*
F. Corone 314.
Dalton c. 108.
Moor 53.
Foster 369.

Sec. 20. It seems to be (*e*) agreed, that if the felony committed be the same in substance with that which was intended, and variant only in some circumstance, as in respect of the time or place at which, or the mean whereby it was effected, the abettor of the intent is altogether as much an accessory as if there had been no variance at all between it and the execution of it ; as where a man advises another to kill such an one in the night, and he kills him in the day, or to kill him in the fields, and he kills him in the town, or to poison him, and he stabs or shoots him.

(*e*) *Plow.* 475.
Summary 217.
1. Hale 617.
Lamb. b. 2.
c. 7. f. 287.
3. Inst. 51.
Crompton 42.
Dalton c. 108.
Foster 370.

Sec. 21. But if a man command another to commit a felony on a particular person or thing, and he do it on (*f*) another ; as to kill *A.* and he kill *B.* or to burn the house of *A.* and he burn the house of *B.* or to steal an ox, and he steal an horse ; or to steal such an horse,

(*f*) *Sum. 227.*
1. Hale 617.
Plowden 475.
Dalton c. 108.
Lamb. b. 2.
c. 7. f. 287.
and *Crompton 42.*

(a) Plow. 475. and he steal another; or to commit a felony of one kind, 2. Inst. 51. and he commit another (a) of a quite different nature; Dalton c. 108. as to rob J. S. of his plate as he is going to market, and Lamb. b. 2. c. 7. f. 287, 288. he break open his house in the night, and there steal the Crompton 42. plate; it is said, that the commander is not an accessary, because the act done varies in substance from that which was Vide Foster 370, 371. commanded.

(b) Plow. 475. Sect. 22. But it is observable, that (b) Plowden, in his report of *Saunders' case*, which seems to be the chief foundation of what is said by others concerning these points, in putting the case of a command to burn the house of A. which shall not make the commander an accessary to the burning the house of B. unless it were caused by burning that of A. states in this (c) manner: "If I command a man to burn the house of such an one, which he well knows, and 2. c. 7. f. 287. "he burn the house of another, there I shall not be accessary, Dalton c. 108. "because it is another distinct thing, to which I did not give Crompton 42. assent, &c." By which it seems to be implied, that it is a necessary ingredient in such a case to make B. no accessary, that he knew the house which he was commanded to burn; for if he did not know it, but mistook another for it, and intending only to burn the house which he was commanded to burn, happen by such mistake to burn the other, it may probably be argued, that the commander ought to be esteemed an accessary to such burning, because it was the direct and immediate effect of an act wholly influenced by his command, and intended to have pursued it. Vide Foster 371, 372. for several observations upon this case.

(d) Lamb. b. 2. Sect. 23. It seems to be generally agreed, (d) that he c. 8. f. 289. who barely conceals a felony which he knows to be intended, is guilty only of a misprision (e) of felony, and Moor 8. shall not be adjudged an accessary. S. P. C. 37. Sum. 129. 219.

3. Inst. 139. 142. (e) See B. 1. c. 59. But this is made a *quære* by Dalton c. 108. 2. Inst. 183.

(f) F. Cor. Sect. 24. It seems to be certain, that no one can be any 116. 172. (f) way punished as an accessary to homicide *per infortunium*, or *se defendendo*, because they are not felonies; B. Cor. 33. 80. from whence it follows, that if he who is indicted or appealed as a principal in murder, be found guilty of such homicide only, those who are only charged as his accessaries before or after, shall be discharged. 15. Affize 7. 11. H. 4. 93. Crompton 43. B. Forf. 13. 1. Hale 615, 616.

(g) 4. Coke And so also shall those (g) who are charged only as accessaries before, where the principal is found guilty of manslaughter; 43. 44. Sum. nary 217. 1. Hale 615 616. Moor 461. C. Eliz. 540. Crompt. 43. Dalt. c. 108. See B. 1. c. 30.

slaughter; because that necessarily supposes the fact to have happened on a sudden; for if it had been done upon premeditation, it would have been murder.

And *quære*, If they who are charged as accessaries (a) after, should not also be discharged at common law, where the principal is found guilty of manslaughter, and admitted to the benefit of his clergy, because in such case it could not appear by any judgment that there was a principal. But the law in this respect seems to be altered by 1. Ann. c. 9. set forth more at large in the following part of this chapter, which makes a *conviction* equivalent, as to this purpose, to an *attainder*.

(a) Vide *Crom.*
44.
3. Inst. 55.
Moor 461.
C. Eliz. 540.
Vide *Foster*
363.

Sec. 25. Before the statute of 11. & 12. Will. 3. c. 7. accessaries to piracy were not within the purview of 28. Hen. 8. c. 15. by which piracy is triable according to the course of the common law. But for this I shall refer the reader to book the first, chapter the thirty-seventh.

AS TO THE THIRD POINT, *viz.* In what cases a man shall be adjudged an accessary after: I shall endeavour to shew,

1. What kind of receipt of a felon will make the receiver such an accessary.

2. Whether it be necessary that such receiver know of the felony.

3. Where the receivers of a felon shall be excused in respect of the relation they bear to him.

4. How far the felony must be complete at the time of the receipt; to make the receiver an accessary.

As to the first particular, *viz.* What kind of receipt of a felon will make the receiver an accessary after the fact.

Sec. 26. It seems agreed, (b) that; generally, any assistance whatever given to one known to be a felon; in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose; as where one assists him with

(b) 2. Inst.
183.
§. P. C. 41.
Dalton c. 108.
Lamb. b. 2.
c. 7. f. 289.
26.

Summary 218. 1. Hale 618. Dalton c. 108. Crompton 43.

(a) Sum. 218. a (a) horse to ride away with, or with money or victuals to support him in his escape; or where one harbours and Dalton c. 108. (b) conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more, where one harbours in his house, and openly (c) protects such a felon; by reason whereof the pursuers dare not take him.

427.
Lamb. b. 2.
c. 7. f. 291.
S. P. C. 43.
Crompton 42. (c) 26. Affize 47. Adj. B. Cor. 130. F. Corone 195.

(d) Sup. c. 23. Sect. 27. Also I take it to be settled at this day, that sect. 7, 8. whoever (d) rescues a felon from an arrest for the felony, F. Cor. 158. or voluntarily (e) suffers him to escape, is an accessory to the 433. felony.
Summary 116. Contra.
F. Corone 48. S. P. C. 43. Dalton c. 108. 1. H. 7. 6. B. Corone 130. (e) Sup. c. 19. section 10. 22. 26.

(f) Sup. sect. 10. and c. 17. Also some have said, (f) that all those are in like manner guilty who oppose the apprehending of a felon.
sect. 1.

But for these matters I shall refer the reader to the former part of this book, wherein they are more fully handled.

(g) B. Escape Sect. 28. It seems to be holden both by (g) *Brook* and 43. (h) *Staundforde*, that the bare receiving into one's house a (b) S. P. C. 41. person known to be a felon, is sufficient without any farther circumstances to make a man an accessory to the felony. (i) 25. E. 3. 39. And this seems to be favoured by THE YEAR-BOOKS of Ab. F. Cor. *Edward the third* (i) and *Henry the sixth* (k). 26. (k) 7. H. 6. 42. Ab. B. Indict. 4. F. Indict. 11.

(l) S. P. C. 41. Also it seems to be holden both by (l) *Staundforde* and (m) Dalton (m) Dalton, that not only such a receipt of such a felon into one's house, but any other favour or aid voluntarily afforded him, as by relieving him with money, meat, or drink, is sufficient for this purpose. But it is observable, that the case in the *Book of* (n) *Affizes* whereon Dalton seems chiefly to ground his opinion, and which is more accurate than any other YEAR-BOOK I met with on this subject, is of one who was indicted "for having received a felon, and for "that no one by reason of him dared to take him:" Whereupon it is said by SHARD, "If one receive a felon in "favour and aid of the felony, I hold such a one an accessory "to the felony." Also it is farther observable, that THE YEAR-BOOK of *Henry the fourth*, (o) on which the above-mentioned opinion of *Brook* seems to be grounded, seems to prove only that every receiver of a felon, knowing him to be such, is indictable, but not that he is indictable for felony;

See also
Crom. 42.
(n) 26. Affize 47.
Ab. B. Cor. 103.
F. Corone 195.
(o) 9. Hen. 4. 1.
Ab. F. Cor. 76.
B. Corone 26.
B. Escape 43.

felony; and the chief purport of the case is to shew, that one who having a felon in his house, voluntarily suffers him to go at large, is not guilty of a felonious escape, unless he had arrested him. To which may be added, that (a) *Lambard* doth not say generally, that all those who receive a felon, knowing him to be such, are accessaries after; but all those who feloniously, and with an evil mind receive a felon, &c. And *Sir Edward Coke*, in his (b) *Second Institute*, describes such accessaries as those who knowing a felony receive the felon, and not only conceal his offence, but favour and aid him, that he be not known. And in his (c) *Third Institute* he saith, " If one receive a thief, and aid and
(a) Lamb. b. 2. f. 289.
(b) Page 183.
(c) Page 134. F. Cor. 427. 1. Hale 619.

Sec. 29. However, it seems to be (*d*) agreed, that no one shall be adjudged an accessary to a felony for receiving into his house a person under bail for such crime, or for relieving with money or victuals a person so bailed, or in prison; and the reason given by (*e*) *Dalton* is, because the felony cannot be concealed, nor the trial hindered by it. And if this be a sufficient reason, why may not any other receipt or relief of a felon, whereby the felony is not concealed, nor the trial, &c. hindered, come under the like rule? as it seems (*f*) agreed, that the sending a letter to procure the deliverance of a felon, or the instructing him to (*g*) read, in order to entitle him to the benefit of clergy, shall do; and even the (*h*) advising his friends to persuade witnesses not to come against him at his trial; and also the (*i*) labouring of witnesses in pursuance of such advice. And yet the two last of these practices are certainly very highly criminal; and though they do not tend totally to prevent the trial, yet are the most likely means to make it fruitless and ineffectual.

Also it seems to be agreed, that the suffering a felon to escape (*k*) without arresting him, (*l*) or the bare concealment (*k*) of a felony, though they are crimes of a very high nature, do not make a man an accessory.

Sum. 219.
1. Hale 618.
Sup. sect. 10.

Moor 8. (1) Sup. scct. 10. 27²⁷. B. 1. c. 59.

See. 30. Also I take it to have been generally agreed, (*m*) Aleyn 57.
 before the statute of 3. & 4. Will. and Mary, c. 9. that Style 91.
 neither the receiving of (*m*) other men's goods, known to C. Eliz. 888.
 Lamb. 290, 291. 1. R. Abr. 68. Summary 218. 1. Hale 619, 620. 25. E. 3. 39.
 20. B. Cor. 126. 27. Affize 69. Ab. F. Cor. 203. B. Cor. 114. Con. Crompt. 42.
 43. 39. It is made a Q. Crim. 42. and S. P. C. 43.

(a) Sum. 130. have been stolen; nor the taking of one's (a) own goods again from one that had stolen them, on an agreement not to prosecute him, nor the taking of any other (b) reward on such an agreement, did make a man an accessary to the felony, unless he also had *received the thief*. But now it is enacted by that statute, and by 5. Ann. c. 31. s. 5. "That if any person or persons shall buy or receive any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, he or they shall be taken and deemed an accessary or accessaries to such felony after the fact, and shall incur the same punishment as an accessary or accessaries to the felony after the felony committed." And it is further enacted by 1. Ann. c. 9. "That such persons may be prosecuted for a misdemeanor, before the principal shall be convicted," as shall be shewn more at large in the following part of this chapter, sect. 44.

(b) Sum. 130. 3. Inst. 134. 138. B. 1. c. 59. sect. 5, 6, 7. Con. Crompt. 41. Lambard 290. 2. And. Qu. Moor 8. and Dalton c. 108. Vide Bk. 1. c. 58. Appeal 8. For the offences in buying and receiving stolen goods, vide Bk. 1. ch. 58. App. 7.

(c) Vide Plowden 476. Dalton c. 108. Sect. 31. It doth not seem to be settled, (c) whether the receipt of a felon who is pardoned by the king, but still liable to an appeal, may not make the receiver an accessary.

As to the second particular, *viz.* whether it be necessary that a man know the felony in order to make him an accessary by receiving the felon.

Sect. 32. There can be no doubt but that it is necessary that such receiver have (d) notice of the felony either expressly or implied; and therefore it is the settled form of all (e) indictments and appeals (f) against accessaries after the fact, expressly to charge them with having known that the person received by them had committed the principal felony.

(d) S. P. C. 41. Summary 218. 1. Hale 622. (e) 7. H. 6. 42. Ab. B. Indict. 4. 3. H. 7. 17. B. Cor. 150. F. Cor. 55. 285. 429. 22. Affize 55. Summary 218. (f) Rastal 43. 54. 51. Co. Ent. 56, 57. 3. Peer Wms. 493.

Sect. 33. But it is not clearly settled, whether in some cases an implied notice of the felony be not sufficient for this purpose; as where a man receives a person attainted of felony, in the same county wherein he is attainted; in which case it hath been (g) holden, that he is an accessary to the felony, whether he had actually notice of the attainder or not; because it appears by matter of record in the same county, whereof every man is said to be consant. But to this it may be answered, that felony implies in it something of wilfulness and baseness; something (b) *felice animo perpetratum*; and that it would be extremely hard, by such

(g) S. P. C. 41. 96. Crompton 43. Dyer 355. F. Cor. 377. Dalton c. 108. Qu. 7. Hen. 6. 42, 43. and see 1. Hale 323. contra. (b) Co. Litt. 391.

such a forced way of reasoning, to presume a man guilty of (a) S.P.C. 41. it, who probably may be entirely innocent; and to this Dalton c. 108. opinion the greater number of (a) authorities seem to incline. Lamb. 293. and see Rex v. Burridge,

3. Peer. Wms. 495. where LORD HARDWICKE says, that the true way of understanding the authorities upon this point is, that "an outlawry or attainder in a particular county may, as the case shall happen to be circumstanced, be *some evidence* to a jury of *notice* to an accessory in the same county; but that it cannot with any reason or justice create an *absolute legal presumption of notice*, so as to excuse the "not charging the fact to be done *knowingly* in the indictment."

As to the third particular, *viz.* Where the receivers of a felon shall be excused in respect of the relation they bear to him.

Sec. 34. It seems agreed, (b) that the law hath such a regard to that duty, love, and tenderness, which a wife owes to her husband, as not to make her an accessory to felony by any receipt whatsoever given to her husband. Yet if she be any way guilty of (c) procuring her husband to commit it, it seems to make her an accessory before the fact in the same manner as if she had been sole. Also it seems agreed, that no other relation beside that of a wife to her husband, will exempt the receiver of a felon from being an (d) accessory to the felony. From whence it follows, that if a master receive a servant, or a servant a master, or a brother a brother, or even a husband a wife, they are accessories in the same manner as if they had been mere strangers to one another.

F. Co. 383. (d) Dalt. c. 108. Crompton 42. sect. 22. Summary 219. S. P. C. 26,

As to the fourth particular, *viz.* How far the felony must be complete at the time of the receipt, to make the receiver an accessory.

Sec. 35. It seems to be clearly agreed, (e) that a man shall never be construed an accessory to a felony, in respect of the receipt of an offender, who at the time of the receipt was not a felon, but afterwards becomes such by matter subsequent; as where one receives another who has wounded (f) a person dangerously, that happens to die after such receipt. For though the offender be for special reasons adjudged to some purposes guilty of homicide *ab initio*, yet he shall not be so esteemed in respect of any others but himself; for fictions of law shall never be carried farther than the reasons which introduce them necessarily require.

CHAPTER THE TWENTY-NINTH

CONTINUED.

OF THE
ARRAIGNMENTOF
PRINCIPAL AND ACCESSARY.

HAVING thus shewn who are to be esteemed *principals*, and who *accessaries*; I am now to shew in what manner they are to be arraigned.

And I shall endeavour to shew,

1. How far it is necessary that the principal be actually attainted or convicted before the accessary shall be proceeded against.

2. Whether the accessary shall in any case be arraigned or tried before any principal hath appeared.

3. Whether a person charged as accessary to more than one, may be tried before all the principals have appeared.

4. Whether the principal and accessary may be both tried by the same inquest, and in what manner they are to be tried.

5. In what manner the accessary shall be tried, where his offence arises in a different county from that of the principal.

As to THE FIRST POINT, *viz.* How far it is necessary that the principal be actually attainted (*a*) or convicted before the accessary shall be proceeded against.

(*a*) Vide
9. Aff. 5.
Bract. 128.

13, 14. and the notes to the fourth of these points.

Sec. 36. It seems clear, that whatsoever the nature of (*b*) F. Aff. the felony be, if the principal be in such manner (*b*) ac-^{291.}

Summary 221. 1. Hale 623, 624. S. P. C. 47. 48. Sup. c. 23. section 140. F. Corone 212. 33. H. 6. 1. 29. Affize 59. Rastal 57. Raymond 477. F. Off. de Court 23. Conspira. 4.

(a) F. Cor. 277. quitted of it, (a) whether at the suit of the king or of the party, that he may plead such acquittal in (b) bar of any subsequent prosecution for the same felony, the accessary shall not be arraigned, but shall be discharged, according to the rule, *ubi factum (c) nullum, ibi fortia nulla*.
 (b) Vide sup. c. 23. sect. 142.
 (c) 4. Co. 43. §. P. C. 47.

SECT. 37. How far the accessary shall be discharged upon the principal's being found guilty of manslaughter, &c. hath been already shewn, section 24.

SECT. 38. It is certain, that *the exigent* shall not be awarded against the accessary before the principal is attainted, as hath been more fully shewn, ch. 27. sect. 128, &c.

SECT. 39. It seems also to be clear, that where the law requires the attainder or conviction of the principal before the accessary shall be convicted, it requires that such attainder and conviction of the principal be on the (d) same suit, and for the same crime, of which the accessary is to be convicted; for it is agreed, that an attainder of the principal at the suit of the (e) king no way helps the proceedings against the accessary at the suit of the party, and *sic è converso*.
 (d) B. App. 19.
 (e) 2. Inst. 184.
 Plowden 98, 99.
 Summary 221.
 S. P. C. 47.
 B. Corone 19. 7. H. 4. 27. Dyer 133.

(f) 40. Aff. 25. Summary 231.
 1. Hale 625.
 22. Affize 40.
 Also it seems to be agreed, that the attainder of the principal of one felony is no way (f) material as to the proceedings against the accessary for another.

SECT. 40. But where the principal is actually attainted, though erroneously, of the same felony with which the accessary is charged, it seems (g) agreed, that such attainder, while it stands unreversed, is as sufficient for this purpose as it would have been if there had been no error in it. Yet it seems (h) certain, that if the principal be attainted, and then the accessary, the reversal of the attainder of the principal, *ipso facto* reverses the attainder of the accessary; and that the heir may have an assize of *mortdancesfor* against the lord of the fee, having entered into the lands of such an accessary, as having elcheated to him by reason of the attainder.
 (g) F. Corone 58.
 1. R. 3. 21, 22.
 Summary 222, 223.
 2. Inst. 184.
 Crompton 43.
 B. Cor. 165.
 174.
 S. P. C. 47.
 7. H. 4. 16.
 9. Coke 68.
 119. (h) Summary 164. 207. B. Cor. 156. 18. E. 4. 9. Crompt. 41. 1. R. Abr. 777. 9. Coke 119. F. Mortdancesfor 46.

(i) Prea. SECT. 41. It seems to have been in a great measure settled (i) before the statute of 1. Ann. c. 9, notwithstanding the

the great variety of opinions in the old books concerning this matter, that wherever the attainder of the principal was prevented by his (a) death, or (b) standing mute, or (a) B. App. challenging (c) peremptorily above the number allowed 19. him by law, or being admitted (d) to the benefit of clergy, B. Corone 86. or (e) pardoned, whether before or after his conviction, the 7. H. 4. 27. accessory should not be arraigned, F. Corone 378. Confpi. 4. Respond. 35

F. N. B. 115. Summary 221. 44. E. 3. 7. 33. H. 6. 12. 27. H. 7. 31. 15. 22. Affize 40. (b) Summary 221. 2. Inst. 284. Con. F. Cor. 58. Qu. S. P. C. 47. (c) Stat. 1. Annæ, c. 9. Qu. S. P. C. 47. F. Corone 51. 3. H. 7. 12. (d) C. Eliz. 541. 4. Coke 43, 44. Summary 221. 3. Inst. 114. 139. 3. H. 7. 1. C. Car. 566, 567. Cromp. 43, 44. Raymond 477. F. Corone 145. 176. 193. 252. 376. 450. B. Cor. 18. 70. 71. 83. 101. 132. 138. 18. Affize 13. 26. Affize 27. 5. Affize 5. 7. H. 4. 16. B. Clergy 15. Con. F. Cor. 58. 53. 270. 466. Crompton 42. 10. H. 4. 15. B. Corone 158. Qu. 3. H. 7. 12. S. P. C. 47. H. 48. (e) Summary 221. F. N. B. 115. C. Eliz. 541. F. Corone 53. F. Confpi. 4. 33. H. 6. 1. B. Corone 18. 4. Coke 43, 44. 3. Inst. 139. Cromp. 44. 3. H. 7. 12. 7. H. 4. 16. Raymond 477. Qu. Cromp. 42. S. P. C. 47. Con. F. Corone 151. 260. B. Corone 70. 3. Affize 14. Vide Dyer 88.

Sec. 42. But it seems to have been generally agreed, (f) that after the principal is actually attainted, whether (f) C. Eliz. after a conviction by verdict, or by (g) outlawry, &c. 541. his death or pardon, &c. subsequent, will no way avail the accessory. 4. Coke 43. 44. Summary 221.

Raymond 477. Con. F. Cor. 450. (g) 4. Coke 43. Dyer 120. F. Cor. 58. 93. 40. Affize 8. 43. E. 3. 17. 3. H. 7. 1. 9. H. 4. 8, 9. B. Corone 16. 5. B. Mainprize 58. Con. as to abjuration, 7. H. 4. 16. B. Corone 18.

Sec. 43. By 1. Ann. sess. 2. c. 9. s. 1. "If any principal offender shall be convicted of any felony, or shall stand mute, or shall peremptorily challenge above the number of twenty persons, returned to serve on the jury, it shall and may be lawful to proceed against any accessory either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding any such principal felon shall be admitted to the benefit of his clergy, pardoned, or otherwise delivered before his attainder; and such accessory shall suffer the same punishment, if he or she shall be convicted, or shall stand mute, or peremptorily challenge above the number of twenty persons returned to serve on the jury, as he or she should have suffered if the principal had been attainted."

Sec. 44. By 1. Ann. sess. 2. c. 9. s. 2. which recites, "that the buyers and receivers of stolen goods had oftentimes conveyed away and concealed the principal felons, so that they could not be convicted of such principal felony, and thereby

thereby such buyers and receivers had escaped all manner of punishment, which had greatly encouraged the buying and receiving of such stolen goods," it is enacted, " That it shall and may be lawful to prosecute and punish every such person or persons buying or receiving any stolen goods knowing the same to be stolen, as for a misdemeanor, to be punished by fine and imprisonment, although the principal felon *be not convicted* before of the said felony, which shall exempt the offender from being punished as accessory, if the *principal shall be* afterwards convicted."

By 4. Geo. 1. c. 11. receivers of stolen goods may be transported for fourteen years.
Vide Bk. 1. c. 58.
App. 7.

† By 5. Ann. c. 31. s. 6. " If any such principal felon *cannot be taken* so as to be prosecuted and convicted, it shall and may be lawful to prosecute and punish every such person and persons, buying or receiving any goods stolen by any such principal felon, knowing the same to be stolen, as for a misdemeanor, to be punished by fine and imprisonment, or other such corporal punishment as the Court shall think fit to inflict, although the principal felon *be not* before convicted of the said felony, which shall exempt the offender from being punished as accessory, if such principal felon shall be afterwards taken and convicted."

Upon these statutes it has been decided, that it is in the election of the prosecutor to proceed either immediately for the misdemeanor, or for the felony when the principal is taken, Lord Raymond 1370. ; and in the first case it is not necessary to aver, that he could not be taken, *Rex v. Pollard*, 8. Mod. 264. or that he had not been convicted, *Rex v. Baxter*, 5. Term Rep. 83. — But Mr. Justice Foster denies this point, if taken in its full extent, to be law ; and contends, that where the principal is amenable, the prosecutor hath no option, but must proceed against the receiver for the felony. Foster 374. And in the case of the King v. Wilkes, at Warwick assizes, a case was reserved on an indictment against a receiver for the misdemeanor ; and the Court held the indictment good, *as reasonable evidence was given that the principal could not be taken and prosecuted, so as to be convicted.* Cases in C. L. 98.

(2) This is provided for by 29. Geo. 2. c. 30.
Vide Bk. 1. c. 58.
† And by 22. Geo. 3. c. 58. " In all cases whatsoever, where any goods or chattels (except lead, iron, copper, brass, bell metal and folder (2) shall have been feloniously taken and stolen, whether the offence shall amount to grand larceny or some greater offence, or to petty larceny only (except where the felon shall have been already convicted of grand larceny, or some greater offence), every person who shall knowingly buy or receive any such goods and chattels, may be prosecuted for a misdemeanor, and shall be punished by fine, imprisonment, or whipping, as the court of quarter sessions, or any other court shall think fit to inflict ; although the principal

"cipal felon or felons be not before convicted of the said felony, and whether he, she, or they is or are amenable to justice or not (3).—And in cases where the felony actually committed shall amount to grand larceny, or to some greater offence, and where the person or persons actually committing such felony shall not be before convicted, such offender or offenders shall be exempted from being punished as accessary or accessaries, if such principal felon or felons shall be afterwards convicted.—Provided, par. 6. that this act shall not repeal any former law against this offence, and that offenders punished under this act shall be exempted from punishment under any other act for the like offence."

(3) The principal felon may be an evidence against the receiver upon this act, Adjudged by all the judges in the case of Rex v. Haslam, 26. Geo. 3.

As to THE SECOND POINT, viz. Whether the accessary shall in any case be arraigned or tried before any principal hath appeared.

SECT. 45. Notwithstanding the numerous (a) authorities in the old books, that an accessary shall not be compelled to answer before the principal have appeared and answered, I take the contrary opinion to be in a great measure (b) settled at this day. And yet it seems to have been always agreed, (c) that his plea cannot be tried before such appearance or attainder, (d) unless he desires it himself; in which case it is agreed, that he may be tried without the principal, according to the rule, that *quilibet potest renunciare juri pro se introducto*.

(a) B. Cor. 11. 20. 118. Fort. 374. 9. H. 7. 19. Bract. 128. 139. 142, 143. F. Resp. 35. 36. F. Cor. 33. 82. 90. 135. 136. 216. 350. F. Tref. 199. 44. Edw. 3.

38. 9. Edw. 4. 48. 49. Edw. 3. 42. 44. Edw. 3. 7. 25. Edw. 3. 44. 40. Affize 8. 25. B. Appeal 9. 189. 2. Rich. 3. 21. B. Mainprise 58. S. P. C. 46. It is said that the law was so anciently, but that it is now changed. Yet Dalton ch. 108. seems to be for the old opinion. (b) Summary 222. 9. Hen. 4. 3. F. Corone 77. B. Appeal 28. S. P. C. 46. (c) Summary 222. 1. Hale 623. 2. Hale 223, 224. B. Appeal 28. 9. Hen. 4. 3. F. Corone 77. S. P. C. 46. 1. And. 109. (d) F. Corone 12. 124. 463. Summary 222. S. P. C. 46.

As to THE THIRD POINT, viz. Whether a person charged as accessary to more than one principal, may be tried before all of them have appeared.

SECT. 46. It seems to be holden by Sir (e) Matthew Hale, agreeably to what seems to be the stronger (f) opinion in *Plowden*, that if a man be indicted as accessary to more than one, and one of the principals appear and be convicted, the Court may, if they please, try the accessary, as being accessary to such principal, and also condemn him, if the issue be found against him; and if it be found for him, may afterwards arraign and try him as accessary to the other when they shall appear.

(e) Sum. 222. 1. Hale 624. (f) Plow. 98, 99.

But

But the contrary opinion is certainly supported by great
 (a) S. P. C. 46. (a) authorities ; neither do I find any instance in the books
 See the books wherein the Court hath actually proceeded to the trial of
 cited to section an accessary in such a case before all the principals have
 47. either appeared or been attainted : And (b) unless there be
 7. H. 4. 36. some very particular circumstances in the case, it cannot
 Qu. B. App. be doubted but that it will be a weighty motive to induce
 22. the Court in discretion to respite the trial of an accessary,
 7. Hen. 4. 36. to shew that some of those to whom he is charged as an ac-
 Keilw. 107. cessary, are neither attainted, nor have appeared ; for it
 (b) Plow. 99. must be owned, that it is a strong objection against the try-
 7. Hen. 4. 36. ing him immediately, as accessary to those who do appear,
 that thereby the country may be subject to the trouble of
 attending two trials where one might do as well ; and the
 person tried may be subject to the hardship and hazard of
 two trials for his life ; which is contrary to the general course
 of the law (as shall be more fully shewn under the chapter
 concerning the plea of *autrefois acquit*) ; whereas if the trial
 should be deferred till all the principals be attainted or ap-
 pear, he would be tried but once. (c) But if there be several
 principals, and a person be charged as accessary to one of
 them only, it seems clear, that it is no objection against his
 being tried as accessary to such a principal, that the others
 have not yet appeared, nor are attainted, &c.

(c) S. P. C. 46.
 Foster 361.

As to THE FOURTH POINT, *viz.* Whether the principal
 and accessary may be both tried by the same inquest, and in
 what manner they are to be tried.

(d) Sum. 222. Sect. 47. It seems (d) to be settled at this day, that if the
 1. Hale 624. principal and accessary appear together, and the principal
 2. Hale 222, plead the general issue, the accessary shall be put to plead
 223. also ; and that if he likewise plead the general issue, both
 Dyer 120. may be tried by (e) one inquest ; but that the principal
 2. Inst. 184. must be (f) first convicted ; and that the jury shall be
 23. E. 3. 94. charged, that if they find the principal not guilty, they shall
 F. Corone 10. find the accessary not guilty.
 11. S. P. C. 46.
 Russell 59. 52.
 53. F. Exigent 4. B. Mainprise 3. Con. Bract. 123. 139. 142. 148. 40. E. 3.
 7. F. Corone 82. 90. 135. 216. 350. F. Trespass 199. 40. E. 3. 42. 25. E. 3.
 44. 40. Affize 25. 44. E. 3. S. B. Appeal 9. F. Corone 15. 113. F. Main-
 prise 58. 2. R. 3. 29. In all which books it seems to be holden, that the accessary
 is not compellable to answer till all the principals be convict. (e) See the books cited
 in letter d. Con. F. Cor. 10. 77. 82. 96. H. 4. 3. 7. H. 4. 36. Dyer 120.
 S. P. C. 46. (f) Summary 222. F. Corone 10. Russell 50, 51, 52. 54.
 2. Co. 117.

But it seems agreed, that if the principal plead a plea in (a) B. Perembar, or to the writ, the accessary shall not (a) be driven to answer till such plea be determined (4).

2. Inst. 184.

S. P. C. 46.

Foster 360. to 368.

(4) Where the principal and accessary are tried by the same inquest, the accessary may enter into the full defence of the principal, and avail himself of every matter of fact, and of every point of law tending to his acquittal; and when the accessary is tried after the conviction of the principal, if it shall come out in evidence that the offence of which the principal was convicted did not amount to felony in him, or not to that species of felony with which he was charged, or if it shall manifestly appear in point of fact that he was innocent, the accessary ought to be acquitted. M'Daniel's Case, Foster 121. 10 State Trials 417. Foster's Third Discourse 365. and Smith's case, Cases in Cro. L. 237.—It is also said, that the production of the record of conviction of the principal is sufficient to put the accessary upon his defence. Foster 363. But it seems that some additional evidence is necessary for that purpose, in order to apply and connect it with the case of a prisoner indicted as accessary; for a bare unqualified record can only be evidence against those who are parties to it. O. B. 1784. p. 474. Foster 365.

As to THE FIFTH POINT, viz. In what manner the accessary shall be tried, where his offence arises in a different county from that of the principal.

SECT. 48. It seems to have been (b) agreed anciently, that by the common law, if a town extend into more than one county, and a felony be committed in that part of it which lies in one county, and there were accessaries in that part of it which lies in another county, an appeal may be brought against the accessaries as well as the principals, in that county in which the principal felony was committed; and where the counties are at a distance, it seems that it may be probably argued, (c) that an appeal may be brought in like manner against all in the county wherein the principal felony was committed; because in an appeal the trial may be by a jury returned from each county. But where one of the counties cannot join with any other in taking an inquest, as that of London, &c. it (d) hath been adjudged, that an appeal against the accessary cannot be brought in either.

(b) 14. Affize 16.

43. E. 3. 17.

21. 34.

B. Cor. 93.

B. Cor. 125.

45. Affize 9.

B. Appeal 30.

and S. P. C.

63.

This case seems to be cited with some doubt.

(c) 3. Hen.

7. 12.

See B. 1. c. 31.

sect. 18. and

Dyer 38, 39,

40.

7. Coke 2.

But F. Cor. 93. B. Cor. 125. B. Appeal 7. 45. Affize 9. and S. P. C. 63. seem to be contrary. In S. P. C. 65. there is an opinion, that in this case there shall be several appeals in the several counties. But now one appeal is sufficient, in the case of murder, by force of 2. & 3. Edw. 6. 24. set forth more at large in the next section. Summary 188. Qu. 44. Affize 16. 43. E. 3. 17. 21. 34. (d) Dyer 38, 39, 40. 7. Co. 2.

Also, because there can be no (e) joinder of counties for the finding of an indictment, it seems to have been very doubt-

(e) Finch 411.

B. 1. c. 31.

sec. 13.

(d) Keilw. 57. (a) doubtful at the common law, where the offence of the accessory arose in a different county from that of the principal, whether it could be indicted at all; because the county in which it arose could not take consanguinity of the principal felony arising in another county, without which they could not find that of the accessory. The accessory in such case is said to be indictable in the county in which the principal felony was committed. But in the Year-Book of 9. Edw. 4 48. 1. abridged F. Cor. 33. and B. Indict. 52. the accessory was indicted in the county in which he was accessory, and the Court wrote to the justices of the county wherein the principal felony was committed, to certify whether the principal was indicted before them. And in S. P. C. 90. this case is holden to be law. See also 3. Inst. 49. 135. But in S. P. C. 63. it is said, that there was no remedy at common law against the accessory where his offence was in a different county from that of the principal, See 1. Hale 623.

Wide Rex v.
Burridge.
3. Peere Will.
466. 494.

Sett. 49. But these matters are fully cleared by the statute of 2. and 3. Edw. 6. c. 24. f. 3. by which it is enacted, "That an appeal of murder may be sued in the same county where the party feloniously stricken or poisoned shall die, as well against the principals as accessories, in whatsoever county or place the accessories shall be guilty; and the justices before whom any such appeal shall be commenced, sued, and taken, within the year and day after such murder and manslaughter committed and done, shall proceed against such accessories in the same county where such appeal should be so taken, in like manner and form as if the same offence of accessories had been committed in the same county where such appeal shall be so taken, as well concerning the trial by the jurors, or twelve men of such county where such appeal shall be taken upon the plea of not guilty, as otherwise."

Sett. 50. And by 2. & 3. Edw. 6. c. 24. f. 4. "That where any murder or felony shall be hereafter committed and done in one county, and another person, or more, shall be accessory or accessories in any manner of wise to any such murder or felony in any other county, that an indictment found or taken against such accessory or accessories upon the circumstances of such matter before the justices of peace, or other justices or commissioners to inquire of felonies in the county where such offences of accessory or accessories in any manner of wise shall be committed or done, shall be as good and effectual in the law, as if the said principal offence had been committed or done in the same county where the same indictment against such accessory shall be found: And that the justices of gaol-delivery, of oyer and terminer, or two of them, of or in any such county where the offence of any such accessory shall be hereafter committed and done, upon suit to them made, shall write to the *custos rotulorum*, or keepers of the records, where such principal shall be

"at-

“ attainted or convicted, to certify them whether such principal be attainted, convicted, or otherwise discharged of such principal felony ; who, upon such writing to them, or any of them, directed, shall make sufficient certificate in writing, under their seal or seals, to the said justices, whether such principal be attainted, convicted, or otherwise discharged, or not : And after they that so shall have the custody of such records, do certify that such principal is attainted, convicted, or otherwise discharged of such offence by the law ; that then the justices of gaol-delivery, or of *oyer* and *terminer*, or other thereto authorized, shall proceed upon every such accessary, in the county where such accessary or accessaries became accessary, in such manner and form as if both the said principal offence and accessary had been committed and done in the same county where the offence of accessary was or shall be committed or done : And that every such accessary shall answer upon his arraignment, and receive such trial, judgment, order and execution, and suffer such forfeitures, pains and penalties, as is used in other cases of felony ; any law or custom to the contrary before used in any wise notwithstanding.”

In the construction of this statute, the following points seem most remarkable, *viz.*

Sec. 51. FIRST, An indictment against an accessary, in pursuance of this statute, in the county wherein he was accessary, ought expressly to recite that the principal did the felony in the other county, and not barely that he was indicted for it ; for that is only an argument, and no direct affirmation that he did it.

8. Coke 118.
Vide sup c.
25. sect. 60.

Sec. 52. SECONDLY, The court of (a) king's bench, in relation to a person there indicted as an accessary in the county wherein the said court happens to sit, to a felony in another county ; and the lord (b) high steward, in relation to a peer to be tried before the lords on an indictment against him as accessary in one county to a felony in another ; are within the purview of the said statute ; not only because it is a remedial law, and made to supply a very mischievous defect of the common law, which oftentimes necessarily occasioned a failure of justice, and therefore ought to have a beneficial construction ; but also because the court of king's bench, being the (c) supreme court of *oyer* and *terminer*, and gaol delivery, may naturally be included in the very words of a statute which gives such justices any new power ; or if it be not thought to be strictly within the words, it is at least within the meaning of them, which

(a) 3. Inst. 49.
135.

9. Coke 118.
Summary 223.
See the notes
to sect. 48.

under letter
(d).
(b) 3. Inst. 49.
135.

(c) Vide sup.
c. 3. sect. 11.

other-

(a) 3. Inf.
136.

otherwise would give a higher privilege to an inferior court than to a superior : And the like in effect may be said in the case of the lord (a) steward, who by the words of his commission, as well as the nature of the thing, seems to be a justice of *oyer and terminer*, and within the very words of the statute, or at least within the meaning. To which may be added, that these words in the latter part of the statute, " That the justices of gaol-delivery, or of *oyer and terminer*, or other there authorized, shall proceed against such accessaries," &c. seem plainly to imply, that such other so authorized may also send for a certificate of the record relating to the principal; for nothing can be more natural than to expound one part of the statute by another. As to the objection, that the words of the statute are, that the said justices, " or two of them," shall write to the *custos rotulorum*, &c. and therefore that the lord steward cannot do it, because he is but one, it may be (b) answered, that those words are to be thus construed, that where there are two or more such justices, they must write, &c. but not where there is but one.

(b) 3. Inf.
136.

(c) Dyer 253,
254-
12. Coke 32.
But Sir Edw.
Coke, in
3. Inf. 49.
135. seems to
make it ne-
cessary for the
justices of the

Sec. 53. THIRDLY, Not only the justices of the king's bench, the pleas before whom are properly styled (c) *placita coram rege*, and not *coram justiciariis*, but any other justices, writing for a certificate in pursuance of the statute, ought to do it by writ in the king's name, and not by a precept in their own names, and under their own seals, and the reason given by Dyer is, because it is a writing from justices to justices.

king's bench only to write in the king's name.

(d) 3. Inf. 49.
136.
(e) Vide sup.
c. 27. sec. 62.
to 69. and sec.
77. to 87.

Sec. 54. FOURTHLY, Where some of those supposed to have been accessaries to a felony in a different county, are proceeded against in the king's bench, in pursuance of the statute, if there be a likelihood that others will be in the same manner proceeded against in another court, it seems most advisable (d) to send for the record relating to the principal by a special writ formed upon the matter according to the words of the statute, and not by *certiorari*, because that would wholly (e) remove the record from the court below into the court of king's bench; which might cause a doubt, whether either the court below or that of the king's bench could certify it upon a subsequent writ; for as to the court below, it might be objected, that being no longer a record of that court, it cannot be certified by it; and as to the king's bench, it might be objected, that the principal was neither attainted nor convicted there; whereas the words of the statute are, " That the justices shall write to the keepers of the records where such principal shall be attainted or con-
" victed."

“victed.” But these doubts are avoided by (a) directing (a) 3. Inst. 49.
a special writ to the court below, on which a special certifi- 136.
cate shall be made in pursuance of the statute, and the record
shall still remain below, and consequently may be certified
from thence on a subsequent writ.

† *Stat. 55.* And for preventing any failure of justice, and tak- Murder, how
ing away all doubts touching the trial of *murders*, it is enacted it may be tried
by 2. Geo. 2. c. 21. “That where any person shall be felo- as if it had
“niously stricken or poisoned upon the sea, or at any place wholly hap-
“out of *England*, and shall die of the same within *England*; pened in Eng-
“or shall be so stricken or poisoned within *England*, and land.
“die of the same upon the sea or out of *England*; an indict-
“ment by the jurors of the county in which such death,
“stroke, or poisoning shall respectively happen, whether
“found before the coroner, or before justices of the peace,
“or other justices or commissioners who have authority to
“inquire of murders, shall be good as well against the prin-
“cipal as the accessory; and the gaol-delivery and *oyer* and
“*terminer* for the county, and also any superior court, into
“which the indictment shall be removed by *certiorari*, may
“proceed therein in all points as if the fact had been wholly
“committed in the said county. And the offenders shall
“be entitled to all and the same advantages, &c. except
“challenges for the hundred.”

CHAPTER THE THIRTIETH.

O F

S T A N D I N G M U T E.

HAVING shewn in what manner a prisoner is to be arraigned, I am in the next place to examine in what manner he is to be dealt with afterwards; and to that end shall endeavour to shew,

1. What is to be done with a prisoner upon his standing mute.

2. What is to be done with a prisoner upon his confession.

3. What is to be done with a prisoner upon his pleading.

AND FIRST, As to the prisoner's *standing mute*, I shall consider,

1. Where he shall be said to stand mute.

2. How it shall be tried whether he do so of malice, or by the act of God.

3. What shall be done where one is found to stand mute by the act of God.

4. Where he who stands mute shall be awarded to the same execution as if he had not stood mute, and where he shall be adjudged to his penance.

5. What is the nature of such penance.

6. What he shall forfeit, and to whom.

7. Whether the prosecutor of an indictment or appeal of larceny be entitled to a restitution of the goods stolen, upon the defendant's standing mute.

8. Where one that stands mute shall have the benefit of clergy.

As to THE FIRST POINT, viz. In what cases a man shall be said to stand mute.

Sec. 1. I take it to be agreed, that he who answers impertinently, or ineffectually, or refuses to put himself upon his trial in such manner as the law directs, may as properly be said to stand mute as he who makes no answer at all, as where a man (a) refuses to plead a plea in chief, or the general issue, but insists on some frivolous defence, or even to plead a good (b) dilatory plea, and refuses to plead over to the felony, in which case after such a plea is found against him, he shall not (c) be admitted to plead in chief, but shall be adjudged to his penance in the same manner as if he had made no plea at all. And so shall he be who pleads a good plea in chief, or the general issue, but (d) refuseth to put himself upon the inquest (that is, to be tried by God and his country if a commoner, or by God and his (e) peers if a lord) or to wage battle where such trial is (f) allowed.

(a) Dyer 49.
241.
2. Hale 316,
317.
Summary 226.
S. P. C. 150.
(b) Keilw. 70.
Vide B. Cor.
22.
(c) Keilw. 70.
(d) B. Pain.
2. 14, 15.
S. P. C. 150.
B. Appeal 93.
2. Inst. 178.
Summary 226.
F. Corone 27. 30. 359. 4. E. 4. 11. 7. E. 4. 29. 14. E. 4. 7. 3. Inst. 227.
B. Cor. 149. 8. E. 4. 3. (e) Kelynge 57. (f) See post. c. 44. S. P. C. 81.

(g) 2. Inst. *Sec. 2.* It seems to be holden in the (g) *Second Institute*, 178. and also in the latter part of *Sir Matthew Hale's Pleas of the* (b) *Crown*, that if a prisoner on his trial peremptorily challenge above the number allowed him by law, he shall not be dealt with as one that stands mute, but shall be hanged: But (i) 3. Inst. this very point is made a *quære* in another (i) part of *Hale's Pleas of the Crown*, and also in (k) *Kelynge*; and (m) 3. H. 7. the contrary is holden in the *Third (l) Institute*: Neither does it seem easy to assign a reason why he who challenges more jurors than he ought, shall, in respect of an implied refusal of a legal trial, be thought worthy of a greater punishment than he who obstinately, directly, and expressly refuses it. To which may be added, that there seems to be but one (n) full authority in the old books for the maintenance of this opinion, whereas there is a great (n) number of the other side.

(b) Sum. 259.
(i) Sum. 226.
(k) Kelynge 36.
(l) 3. Inst. 227.
(m) 3. H. 7. 12.
F. Corone 56.
B. Corone 136.
B. Pain. 5.
And note, there is no other authority cited for this opinion by Coke, Hale, or Kelynge. 2. Inst. 178. Summary 259. Kelynge 36. (n) F. Cor. 359. 3. H. 7. 12. Abr. F. Cor. 51. B. Clergy 27. And note that this case is the more remarkable, because of the very same year with the former, and subsequent to it. Vide Kelynge 3. 3. H. 7. 2. 5. The like is said to be adjudged by all the justices but Keble; and this case is abridged. B. Appeal 82. B. Pain. 4. 2. Hale 316.

A prisoner thus perversely and obstinately offending is, in high treason, *ipso facto*, attainted. 2. Hale 268. 4. Comm. 348. And in felony the challenge shall be overruled. 2. Hale 376. Vide *infra* section 7. notes.

Sett. 3. But it is clear, (a) that he who demurs in law to an indictment or appeal, shall not be esteemed to stand mute, nor be dealt with as such, as having refused a trial by his country, for he puts himself upon a trial by the Court, which is the proper trial of a matter in law. (a) See the next chapter, section 5.

Sett. 4. Also it seems clear, that after a man hath confessed himself guilty, or pleaded, and put himself upon his country, he shall not afterwards be demeaned as one that stands mute, in respect of his subsequent silence; but the jury shall be charged, and the trial shall proceed, and the like judgment shall be given as in common cases. (b) S. P. C. 150. Same point admitted, 8. Hen. 4. 3. 5. which is abridged B. Pain. 2. But in these books it is incidentally holden, that where a man does not confess, but pleads not guilty, and after stands mute, he shall be put to his penance. (c) Kelynge 36, 37. Summary 225, 226. 2. Hale 316. 15. Edw. 4. 33. Ab. B. Penance 9. B. Corone 51. Con. 8. Hen. 4. 3. for which see the note next above.

As to THE SECOND POINT, *viz.* In what cases, and in what manner it shall be tried, whether one who stands mute do so of malice, or of the act of God.

Sett. 5. It seems agreed, (d) that where a prisoner wholly stands mute without making any answer at all, the Court shall take an *inquest of office* by the oath of any (e) twelve persons that (f) happen to be present, whether he do so of malice, or by the act of God. But (g) after an issue hath been joined, if the prisoner stand mute when the jury are in court, if there be any need for such inquiry, it shall be made by them, and not by an *inquest of office*. (d) Sum. 225. S. P. C. 150. 2. Inf. 177, 178. 8. H. 4. 7. F. Corone 71. 225. 43. Affize 30. B. Appeal 24. (e) Raft. Ent. 385. 3. (f) 8. Hen. 4. pl. 1, 2.

F. Corone 71. B. Appeal 24. (g) S. P. C. 150. from the authority of 8. Hen. 4. 3. for which see the notes to the precedent section

Sett. 6. Where (h) a man answers, but not effectually, it seems needless to make any inquiry whether his refusal be owing to his malice or not, because it is apparent. (h) Sum. 226. S. P. C. 150. 2. Inf. 177, 178. 2. Hale 317.

As to THE THIRD POINT, *viz.* What shall be done where one is found to stand mute by the act of God.

Sett. 7. It is agreed, (i) that in such a case, the judges of the court (who are always to be of counsel with the prisoner, to see that he have law and justice) shall not only cause the felony to be inquired of, but also whether the prisoner be the same person, and all other matters which he might have pleaded in his defence. (i) S. P. C. 150. 2. Inf. 177, 178. Cases in Cro. Law 358.

And such inquiry shall be made, as I suppose, not by an inquest of office, but by a jury returned by the sheriff in the same manner as if the defendant had actually pleaded; for since it is no way his fault that he did not so plead, there is no reason why his trial should be in a more loose and summary manner, or any way less regular or solemn, than if he had. To which may be added, that *Sir Matthew*

- (a) Sum. 225. *Hale* saith, (a) "that the felony shall be inquired of, &c. "in the same manner as if the prisoner had pleaded "not guilty;" from which words it seems plain, that, in his opinion, the inquiry ought to be by an inquest returned by the sheriff as in the other trials at the mise of the parties, because if the defendant had pleaded, it must certainly have been so. And therefore it seems reasonable, that where *Sir William Staundford* (b) having spoken of such inquiry adds immediately, that "it is but an inquest of office," ought to be understood, not of the inquiry of the felony, whereof he had last spoken, but of the inquiry whether the prisoner stood mute of malice, or by the act of God, whereof he had spoken in the sentence next before; and I the rather incline to think that this is his meaning, because the (c) books cited by him, to this point, relate to this inquiry only.
- (b) S. P. C. 150.
- (c) F. Cor. 225.
43. Affize 30.
8. H. 4. 1.
2. Hale 316,
317. accords.

Old Bailey session 1778, (No. 32.) Francis Mercier, on his arraignment for murder, stood mute. The sheriff was directed to return a jury to inquire whether it was "through obstinacy or the visitation of God."—The jury found that he stood mute "fraudulently, wilfully and obstinately, and not by the providence of God." The judge immediately passed sentence, and he was executed. Vide 12. Geo. 3. c. 20. *Infra* section 25.

As to THE FOURTH POINT, *viz.* In what cases he that stands mute shall be awarded to the same execution as if he had not stood mute, and where he shall be adjudged to his penance, I shall consider,

1. What shall be done to him who stands mute after an attainder.
2. What to a person arraigned for high treason.
3. What to one arraigned for petit larceny.
4. What to one arraigned for felony by statute.
5. What to one arraigned upon an appeal.
6. What to one indicted of a capital felony, or petit treason.

As

As to the first particular, *viz.* What is to be done to him who stands mute after an attainder.

Sec. 8. It seems to be settled (*a*) at this day, that wherever one who is attainted, either by judgment on a verdict, or confession, or by outlawry, or abjuration, stands mute to the demand why execution should not go against him, he shall not be awarded to his penance, but to the same kind of execution, if any, that would have been awarded, if he had not stood mute.

(*a*) Sum. 226.
2. Hale 315,
316.
Kelynge 36.
S. P. C. 150.
So adjudged,
8. Hen. 4. 3.
Ab. B. Pain. 2.
B. Corone 22.

as to the cause of abjuration or any other attainder after a confession; but the contrary is insinuated as to other attainders. But in 26. Affize 19. Ab. F. Cor. 191. B. Pain. 12. F. Cor. 99. one who had abjured standing mute, was put to his penance and not hanged,

Yet there seems to be this difference, that where one who hath always continued in prison, after an attainder by verdict or confession, stands mute to the demand why execution should not go, it shall be awarded (*b*) against him, without any inquiry whether he stand mute by malice, or otherwise, or whether he be the same person who is so attainted or not; because it sufficiently appears that he is the same person, and that is sufficient to justify an award of execution against him, where nothing appears to the contrary. But if a person so attainted, be retaken after an escape; or if one be taken after an outlawry or abjuration, and stand mute to the demand, why execution should not go against him? it shall be inquired, whether he stand mute of malice, or of the act of God; and if it be found of malice, it seems that execution shall be awarded without any farther inquiry: (*c*) But if it be found to be of the act of God, it seems, that it ought to be also inquired, whether he be the same person or not, in the same manner as where one stands mute by the act of God, when first brought upon his trial.

(*b*) S. P. C.
150.
10. Edw. 4.
19. 26.
F. Corone 36.
B. Corone 155.

(*c*) S. P. C.
150.
10. Edw. 4.
pl. 19. pl. 26.
F. Cor. 36.
B. Corone 155.

As to the second particular, *viz.* What is to be done to one who stands mute to an arraignment for high treason.

Sec. 9. It is clearly settled (*d*) at this day, that standing mute upon an arraignment for high treason is equivalent to a conviction by verdict or confession, and consequently subjects the criminal to the same kind of judgment

(*d*) Summ.
226.
2. Hale 317.
Skinner 145.
Savile 56.

Kelynge 57. Dyer 205. 1. Inst. 177. B. Pain. 19. Co. Lit. 391. 3. Inst. 14. S. P. C. 150. Con. F. Cor. 283.

(a) Vide sup.
sect. 5, 6, 7.
18, Edw. 3.
26.
S. P. C. 150.
(b) S. P. C.
150.

and execution as such a conviction would do. But I take it for granted, that such standing mute must in (a) like manner appear to be obstinate; and that if it be found to be the act of God, the whole matter shall in like manner (b) be inquired of, as hath been more fully shewn in the former part of this chapter. But where such person appears to stand obstinately mute, I do not find it any where holden, that there is any necessity that he probably appear to be guilty, or that any evidence be examined to prove him so, before he shall be condemned or executed. But this is advisable, where one stands obstinately mute on an arraignment for felony by statute, as shall be more fully shewn in the fourteenth and fifteenth sections.

As to the third particular, viz. What is to be done to one who stands mute to an arraignment for petit larceny.

(c) 2. Inst.
177.

SECT. 10. I take it to be agreed, (c) that if a man appear to stand obstinately mute on an arraignment for petit larceny, he shall have the like judgment, &c. as if he had confessed the indictment.

As to the fourth particular, viz. What is to be done to those who stand mute to an arraignment for felony by statute.

(d) Dyer 241.
3. Inst. 114.
2. Hale 320.
St. Tr. 367.
B. 1. c. 37.
sect. 9.
S. P. C. 150.
Summary 226.
2. Hale 328,
319.

SECT. 11. It is expressly enacted by 33. Hen. 8. c. 12. f. 12. "That if a person indicted, and arraigned of treason, misprison of treason, murder, manslaughter, or bloodshed, &c. against that act, within the verge of the court, shall obstinately refuse to answer directly, or shall stand mute, he shall have the like judgment, &c. as if he were found guilty, &c." But (d) where a statute, as that of piracy, &c. ordains a trial by the common course of the law, it hath been adjudged, that the criminal shall have judgment of his penance, &c. as in other felonies.

As to the fifth particular, viz. What is to be done to one who stands mute to an arraignment on an appeal.

(e) Sum. 226.
Sed 2. Hale
317. 322.
contra.
(f) S. P. C. 159.
(g) B. Pain. 8.
19.
(b) 2. Inst.
178, 179.
(i) Kelynge 37.

SECT. 12. It is holden by Sir Matthew Hale, (c) that an appellee of felony standing mute shall not have judgment of penance, but to be hanged; but this is made a *quære* in (f) *Staundforde*, and (g) *Brook*; and the contrary opinion seems to be favoured by Sir (b) *Edward Coke*, and is expressly holden by (i) *Kelynge*, and supported by several

several (a) resolutions in the old books; whereas THE (a) 8. Hen. 4. YEAR-BOOK of *Edward the third* (b) seems to be the only resolution in favour of the other side. To which it may be answered, not only that three of the above-cited resolutions to the contrary are much later, but also that the appellee in this case appears to have been taken with the *mainour*, (c) which probably might be a circumstance of considerable weight in the judgment.

B. Pain. 14. 43. Affize 30. Ab. B. Pain. 13. B. Appeal 78. B. Corone 123 or 124. F. Corone 225; and in 14. Edw. 4. pl. 7. this point is made a *quære*; but in the very next folio, pl. 17. Ab. B. Corone 161. it is adjudged by all the justices, that the appellee in such case should have his penance. (b) 21. Edw. 3. pl. 18. Ab. B. Pain. 8. B. Appeal 40. B. Corone 43. But neither F. Corone 56. nor 3. Hen. 7. 2. pl. 5. nor 3. Hen. 7. 12. pl. 5 cited by *Stauford*, seem to come up to this point, but rather to be authorities of the other side. See B. Corone 82. (c) Vide sup. c. 15. sect. 41.

As to the sixth particular, *viz.* What is to be done to one who stands mute to an indictment of a capital felony, or a petit treason.

Sect. 13. It is enacted by the (d) above-mentioned statute of Westminster the first, c. 12. "That notorious felons which openly be of evil fame, and will not put themselves in enquests of felonies, that men shall charge them with before the justices at the king's suit, shall have strong and hard imprisonment, as they which refuse to stand to the common law of the land." But this is not to be understood of such prisoners as be taken on light suspicion.

Sect. 14. Sir (e) *Edward Coke*, in the construction of this statute, saith, that "no person shall be put to this punishment, unless the matter be evident or probable, which it is the duty of the judge to look into;" and Sir *William* (f) *Stauford* saith, "that there ought to be evident or probable matter to convict the party of the crime whereof he is arraigned, or otherwise that he be a notorious felon, or openly of bad fame;" and therefore he advises the judge, for the satisfaction of this statute, and discharge of his duty, to examine the evidence which proves the prisoner guilty of the fact, before he proceed to the judgment of *paine fort et dure*. Yet I cannot find any book which takes notice of any examination of this kind, or of any entry that the defendant appeared to be a notorious felon, before such judgment given against him, upon his standing mute, whether upon an (g) indictment or (h) appeal: but all the books cited in the margin seem to intimate, that the standing mute is of itself a sufficient ground for such judgment. Yet all that can be inferred from thence seems to be this, that it is not necessary to make any thing of this kind part

- of the record, it being a matter left to the discretion and conscience of the judge, and to be presumed where it is not expressed. But as to all capital appeals whatsoever, and all indictments and appeals of petit treason, perhaps it may be said, that (a) not being within this statute, but remaining as they were at the common law, the obstinacy of a criminal in standing mute to them, may be of itself, without more, a sufficient inducement to a judge to award him to his penance. But considering that such appeals and indictments are within the same reason with those mentioned in the statute; and it is uncertain how the common law stood in relation to these matters, as appears by the best authors (b) differing among themselves concerning them; and seeing the method prescribed by the statute is very just and equitable; it seems prudent at least in a judge to observe the same rules in all cases of this kind.
- (a) S. P. C. 150.
2. Inst. 177, 178, 179.
and the books cited sect. 12.
under let. (a).
- (b) S. P. C. 149.
2. Inst. 178, 179.

Seet. 15. I do not find it said in any book, what shall be done to a prisoner who obstinately standing mute to an arraignment, shall appear to be charged upon very light suspicion; but I take it for granted, that he may be severely fined and imprisoned for the contempt.

As to THE FIFTH POINT, viz. What is the nature of the penance to which a prisoner is to be adjudged upon his obstinately standing mute.

- Seet. 16.* It is observable, that the above-cited *statute of Westminster the first* says only in general, "that felons standing mute shall be put in prison *forte et dure*," without saying any thing of the manner of it, which it seems to leave as a known thing to the usual practice in such cases; which we shall best find from the books of Entries, and other law books, all of which generally agree, that the prisoner shall be remanded (c) to the place from whence he came, and put (d) in some low dark room, (e) and there laid on his back, without any manner of covering, except for the privy parts, and (f) that as many weights shall be laid upon him
- (c) Sum. 227.
2. Hale 319.
399, 400.
S. P. C. 150.
Keilw. 70.
4. Edw. 4. pl. 11.
14. E. 4. 8. Ab. B. Cor. 161. 2. Inst. 178. Raft. Ent. 385. 8. H. 4. 1. (d) This clause is omitted in Keilw. 70. 4. E. 4. 11. but it is mentioned in all the other books above cited, but with this difference, That 14. E. 4. 11. says only that he shall be put in a chamber, without adding that it shall be low or dark. (e) In this all the books above cited seem to agree; and the Year-Book 14. E. 4. 8. pl. 17. S. P. C. 150. and 2. Inst. 178. add, that he shall lie without any litter or other thing under him, and that one arm shall be drawn to one quarter of the room with a cord, and the other to another, and that his feet shall be used in the same manner; but these clauses are wholly omitted in all the other books above cited, except Hale's Summary, which takes notice of the latter of them only; and Raftal Entries 385. pl. 2. adds, that a hole shall be made for the head: and Keilway 70. 2. says, that the head shall not touch the earth; but none of the other mention either of these clauses. (f) In this all the books above recited agree,

as he can bear, and more, and that he shall have no manner of sustenance but of the worst (a) bread and (b) water, and that he shall (c) not eat the same day in which he drinks, nor drink the same day on which he eats; and that he shall so continue till he (d) die. But it is said, (e) that anciently the judgment was not, "that he should so continue till he should die," but "till he should answer," and that he might save himself from the penance by putting himself on his trial, which he cannot do at this day after the judgment of penance is once given.

bread; and Rastal 385. and 2. Hen. 4. 1. generally that he shall have of the worst bread. (b) 14. Edw. 4. 8. S. P. C. 150. 2. Inst. 178. and 8. Hen. 4. 1. and Keilway 70. are, that he shall have the water next the prison, so that it be not current; but Rastal 385. is general, that he shall have the worst water. (c) This is omitted in Keilway 70. and in 8. Hen. 4. 1. (d) This is omitted in none of the books above cited except 14. Edw. 4. pl. 11. and Summary 227. but neither of these books give the whole judgment at large. (e) S. P. C. 150, 151. Britton 11.

(a) But 14. Edw. 4. 8. S. P. C. 150. and 2. Inst. 178. are, that he shall only have three morsels of barley bread a day; Keilw. 70. a. that he shall have only rye

SecT. 17. It seems clear, (f) that women, upon standing mute, are liable to such penance as well as men.

(f) 2. Inst. 177. 2. Hale 319.

SecT. 18. It is said (g) to be the constant practice of Kelynge NEWGATE sessions, where a prisoner refuses to plead, to endeavour to compel him to do it by tying his thumbs together with whipcord, and not to proceed to the judgment and penance, before all methods of persuading him to plead are found ineffectual.

(g) 27. This practice is rendered unnecessary by 12. Geo. 3. c. 20. Vide infra sect. 25.

As to THE SIXTH POINT, viz. What he who obstinately stands mute shall forfeit, and to whom.

SecT. 19. There is no doubt but that in case of (b) high treason he shall forfeit both lands and goods, in the same manner as if he had been attainted any other way. Also I take it for granted that in the case of felony and petit treason, where a person by standing mute shall not avoid being attainted for such crimes, he shall forfeit his lands and goods in the same manner as on other attainders. But wherever a person standing mute is adjudged to his penance, and thereby prevents that attainder which otherwise he might have incurred, it seems agreed, (i) that he forfeits his chattels only, and not his lands.

(b) See the books cited to sect. 9.

(i) 14. E. 4. 7. Sum. 226, 227. 2. Hale 319.

Coke Lit. 391. F. Esc. 10. F. Corone 51. Affize 421. S. P. C. 151. a. B. Forf. seit. 11. 64. B. Appeal 24. 8. H. 4. 1, 2. 3. H. 7. 12.

SecT. 20. It is agreed in THE YEAR-BOOK of 8. (k) Hen. 4. that the goods so forfeited ought not to be delivered to any person claiming them under a grant from the crown, till he have shewed a good title to them in the king's court, by some grant sufficient to pass them.

(k) 8. H. 4. 2. B. Appeal 24.

- (a) Dyer 268. *Sec. 21.* And it seems, (a) that such goods will not pass by grant of all felons goods, having no words specially extending to the goods of those who stand mute, &c. because a person adjudged to his penance for standing mute, does not seem to suffer as a felon, being neither attainted nor convicted of any felony, but as a person refusing to stand by the law of the land. And it seems rather the wrong opinion, (b) that they pass not by the grant of "all goods or felons and fugitives of all persons within such a district; so that if such persons for any trespass or other fault ought to lose life or member; or shall fly and refuse to stand to judgment, or do any other trespass for which they ought to lose their chattels."
- (b) Dyer 268. *Sec. 21.* And it seems, (a) that such goods will not pass by grant of all felons goods, having no words specially extending to the goods of those who stand mute, &c. because a person adjudged to his penance for standing mute, does not seem to suffer as a felon, being neither attainted nor convicted of any felony, but as a person refusing to stand by the law of the land. And it seems rather the wrong opinion, (b) that they pass not by the grant of "all goods or felons and fugitives of all persons within such a district; so that if such persons for any trespass or other fault ought to lose life or member; or shall fly and refuse to stand to judgment, or do any other trespass for which they ought to lose their chattels."
- (c) Dyer 268. *Sec. 21.* And it seems, (a) that such goods will not pass by grant of all felons goods, having no words specially extending to the goods of those who stand mute, &c. because a person adjudged to his penance for standing mute, does not seem to suffer as a felon, being neither attainted nor convicted of any felony, but as a person refusing to stand by the law of the land. And it seems rather the wrong opinion, (b) that they pass not by the grant of "all goods or felons and fugitives of all persons within such a district; so that if such persons for any trespass or other fault ought to lose life or member; or shall fly and refuse to stand to judgment, or do any other trespass for which they ought to lose their chattels."

As to THE SEVENTH POINT, viz. Whether the prosecutor of an indictment or appeal of larceny be entitled to a restitution of the goods stolen, upon the defendant's standing mute.

- (c) Vide sup. *Sec. 22.* It seems agreed, (c) that by the common law, where a person stands mute to an appeal of larceny, it is proper to charge the same inquest which is to inquire whether the standing mute be of malice or not, to inquire also whether the goods mentioned in the appeal are the goods of the appellant, and whether the defendant were taken upon a fresh suit (d) made by such appellant; which points being found (e) for him, he shall have an award of restitution to such goods, and to such only, (f) in whose hands soever (g) they are found. And it is said in general in some books, (h) that in any appeal of larceny there shall be a restitution of the goods, upon the appellee's standing mute, without saying any thing of any inquiry concerning the property, or fresh suit: but I take it for granted, that where it is so omitted, it is taken as a thing known, and done of course, and therefore needless to be expressly mentioned.
- (d) Vide c. 23. sect. 53. *Sec. 22.* It seems agreed, (c) that by the common law, where a person stands mute to an appeal of larceny, it is proper to charge the same inquest which is to inquire whether the standing mute be of malice or not, to inquire also whether the goods mentioned in the appeal are the goods of the appellant, and whether the defendant were taken upon a fresh suit (d) made by such appellant; which points being found (e) for him, he shall have an award of restitution to such goods, and to such only, (f) in whose hands soever (g) they are found. And it is said in general in some books, (h) that in any appeal of larceny there shall be a restitution of the goods, upon the appellee's standing mute, without saying any thing of any inquiry concerning the property, or fresh suit: but I take it for granted, that where it is so omitted, it is taken as a thing known, and done of course, and therefore needless to be expressly mentioned.
- (e) Sup. c. 23. sect. 53. *Sec. 22.* It seems agreed, (c) that by the common law, where a person stands mute to an appeal of larceny, it is proper to charge the same inquest which is to inquire whether the standing mute be of malice or not, to inquire also whether the goods mentioned in the appeal are the goods of the appellant, and whether the defendant were taken upon a fresh suit (d) made by such appellant; which points being found (e) for him, he shall have an award of restitution to such goods, and to such only, (f) in whose hands soever (g) they are found. And it is said in general in some books, (h) that in any appeal of larceny there shall be a restitution of the goods, upon the appellee's standing mute, without saying any thing of any inquiry concerning the property, or fresh suit: but I take it for granted, that where it is so omitted, it is taken as a thing known, and done of course, and therefore needless to be expressly mentioned.
- (f) Sup. c. 23. sect. 53. *Sec. 22.* It seems agreed, (c) that by the common law, where a person stands mute to an appeal of larceny, it is proper to charge the same inquest which is to inquire whether the standing mute be of malice or not, to inquire also whether the goods mentioned in the appeal are the goods of the appellant, and whether the defendant were taken upon a fresh suit (d) made by such appellant; which points being found (e) for him, he shall have an award of restitution to such goods, and to such only, (f) in whose hands soever (g) they are found. And it is said in general in some books, (h) that in any appeal of larceny there shall be a restitution of the goods, upon the appellee's standing mute, without saying any thing of any inquiry concerning the property, or fresh suit: but I take it for granted, that where it is so omitted, it is taken as a thing known, and done of course, and therefore needless to be expressly mentioned.
- (g) Sup. c. 23. sect. 53. *Sec. 22.* It seems agreed, (c) that by the common law, where a person stands mute to an appeal of larceny, it is proper to charge the same inquest which is to inquire whether the standing mute be of malice or not, to inquire also whether the goods mentioned in the appeal are the goods of the appellant, and whether the defendant were taken upon a fresh suit (d) made by such appellant; which points being found (e) for him, he shall have an award of restitution to such goods, and to such only, (f) in whose hands soever (g) they are found. And it is said in general in some books, (h) that in any appeal of larceny there shall be a restitution of the goods, upon the appellee's standing mute, without saying any thing of any inquiry concerning the property, or fresh suit: but I take it for granted, that where it is so omitted, it is taken as a thing known, and done of course, and therefore needless to be expressly mentioned.
- (h) Sup. c. 23. sect. 53. *Sec. 22.* It seems agreed, (c) that by the common law, where a person stands mute to an appeal of larceny, it is proper to charge the same inquest which is to inquire whether the standing mute be of malice or not, to inquire also whether the goods mentioned in the appeal are the goods of the appellant, and whether the defendant were taken upon a fresh suit (d) made by such appellant; which points being found (e) for him, he shall have an award of restitution to such goods, and to such only, (f) in whose hands soever (g) they are found. And it is said in general in some books, (h) that in any appeal of larceny there shall be a restitution of the goods, upon the appellee's standing mute, without saying any thing of any inquiry concerning the property, or fresh suit: but I take it for granted, that where it is so omitted, it is taken as a thing known, and done of course, and therefore needless to be expressly mentioned.
- (i) Sup. c. 23. sect. 53. *Sec. 22.* It seems agreed, (c) that by the common law, where a person stands mute to an appeal of larceny, it is proper to charge the same inquest which is to inquire whether the standing mute be of malice or not, to inquire also whether the goods mentioned in the appeal are the goods of the appellant, and whether the defendant were taken upon a fresh suit (d) made by such appellant; which points being found (e) for him, he shall have an award of restitution to such goods, and to such only, (f) in whose hands soever (g) they are found. And it is said in general in some books, (h) that in any appeal of larceny there shall be a restitution of the goods, upon the appellee's standing mute, without saying any thing of any inquiry concerning the property, or fresh suit: but I take it for granted, that where it is so omitted, it is taken as a thing known, and done of course, and therefore needless to be expressly mentioned.
- (k) Set forth more at large c. 23. sect. 55. *Sec. 22.* It seems agreed, (c) that by the common law, where a person stands mute to an appeal of larceny, it is proper to charge the same inquest which is to inquire whether the standing mute be of malice or not, to inquire also whether the goods mentioned in the appeal are the goods of the appellant, and whether the defendant were taken upon a fresh suit (d) made by such appellant; which points being found (e) for him, he shall have an award of restitution to such goods, and to such only, (f) in whose hands soever (g) they are found. And it is said in general in some books, (h) that in any appeal of larceny there shall be a restitution of the goods, upon the appellee's standing mute, without saying any thing of any inquiry concerning the property, or fresh suit: but I take it for granted, that where it is so omitted, it is taken as a thing known, and done of course, and therefore needless to be expressly mentioned.
- (l) Sup. c. 23. sect. 53. *Sec. 22.* It seems agreed, (c) that by the common law, where a person stands mute to an appeal of larceny, it is proper to charge the same inquest which is to inquire whether the standing mute be of malice or not, to inquire also whether the goods mentioned in the appeal are the goods of the appellant, and whether the defendant were taken upon a fresh suit (d) made by such appellant; which points being found (e) for him, he shall have an award of restitution to such goods, and to such only, (f) in whose hands soever (g) they are found. And it is said in general in some books, (h) that in any appeal of larceny there shall be a restitution of the goods, upon the appellee's standing mute, without saying any thing of any inquiry concerning the property, or fresh suit: but I take it for granted, that where it is so omitted, it is taken as a thing known, and done of course, and therefore needless to be expressly mentioned.

Sec. 23. But it seems questionable, Whether the prosecutor of an indictment of larceny be in like manner intitled to a restitution upon the defendant's standing mute? because it seems agreed, (i) that by the common law there could be no such restitution upon any other prosecution but an appeal; and it is certain, that the prosecutor of an indictment is not entitled to a restitution by the express words of 21. (k) Hen. 8. c. 11. which require, "that the felon be found guilty, or otherwise attainted, &c." and I do not know that he is entitled to it by any other statute, or any equitable construction of this.

As to THE EIGHTH POINT, *viz.* Where one who stands mute shall have the benefit of his clergy.

Sec. 24. It seems clear, (a) that unless it happen to be otherwise specially provided by some statute, wherever he shall be allowed it upon a conviction, by verdict or confession, he shall have it upon his standing mute. (a) F. Cor. 233. 283. Assize 421. 8. H. 4. 3. Summary 235. 2. Hale 320. 380. Moore 550. 3. H. 7. 12. Ab. B. Clergy 27. F. Corone 51. 3. H. 7. 12. Ab. F. Cor. 53. F. Cor. 58. seems contrary; but I cannot find anything in 3. H. 7. 1. which is the Year-book cited to this note, to warrant this opinion.

Sec. 25. Also I take it to be agreed, (b) that a statute taking away the benefit of clergy from those who shall be convicted of a crime, doth not thereby take it away from those who stand mute on an indictment or appeal for such crime. (b) See Sum. 332. to 338. 2. Hale 345.

Sec. 26. But it is enacted by 3. & 4. Will. & M. c. 6. set forth more at large in the chapter of clergy, "That if any person shall be indicted of any offence, for which by virtue of any former statute he is excluded from the benefit of his clergy, if he had been thereof convicted by verdict or confession, if he stand mute he shall not be admitted to it."

Sec. 27. But appeals and offences excluded from the benefit of clergy by subsequent statutes, seem not to be within the purview of this statute; for the fuller consideration whereof I shall refer the reader to the chapter of Clergy.

+ *Sec. 28.* And it is enacted by 12. Geo. 3. c. 20. "That *Vide ante,* if any person being arraigned on any indictment or appeal *sec. 6.* for felony, or on any indictment for piracy, shall upon such arraignment stand mute, or will not answer directly to the felony or piracy, he shall be convicted of the felony or piracy charged in such indictment or appeal; and the court before whom he shall be so arraigned shall thereupon award judgment and execution against such person in the same manner, and attended with the same consequences, as if he had been convicted by verdict or confession."

CHAPTER THE THIRTY-FIRST.

OF

CONFESSION

AND

DEMURRE R.

AND now I am to consider what is to be done to a prisoner upon his confession; which may be either Express, or Implied.

SECT. 1. AN EXPRESS CONFESSION is where a person (a) S. P. C. directly confesses (a) the crime with which he is charged, ^{142.} which is the highest conviction that can be, and may be ^{Lamb. b. 4.} received (b) after the plea of "not guilty" recorded, not- ^{c. 9.} withstanding the repugnancy; for the entry is, that (b) Kelynge the defendant *postea* or *relicta verificatione* "cognovit in- ^{11.} *dictamentum.*" ^{Qu. if the law be the same in}

civil actions. Affirmed Cro. Eliz. 144. Denied 2. Jones 156.

SECT. 2. Such a confession carries with it so strong a presumption of guilt, that an entry (c) on record *quod cognovit* (c) 9. H. 6. 60. *indictamentum, &c.* in an indictment of trespass, estops the F. Estoppel defendant to plead "not guilty" to an action brought afterwards against him for the same matter. But it seems questionable, whether such entry of a confession of an indictment of a capital crime, will in the like manner estop a defendant to plead "not guilty" to an appeal, because in ^{24. 102.} ^{11. H. 6. 65.} ^{Lamb. b. 4.} ^{c. 9.} ^{Tr. per Pais} ^{25.} case of life the Court will be very tender in going upon presumptions.

And where a person upon his arraignment actually confesses (d) himself guilty, or unadvisedly discloses the special (d) S. P. C. (e) manner of the fact, supposing that it doth not amount ^{141.} to felony, where it doth, yet the judges, upon probable ^{2. Hale 225.} circumstances, that such confession may proceed from fear, ^{(c) 22. Aff 71.} menace, or duress, or from weakness or ignorance, may ^{Ab. F. Cor.} refuse to record such confession, and suffer the party to plead ^{180.} not guilty. ^{27. Affize 40.}

SECT.

Sec. 3. AN IMPLIED CONFESSION is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine: in which case, if the Court think fit to accept of such submission, and make an entry that the defendant *posuit se in gratiam regis*, with *Aut* putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the defendant shall (a) not be estopped to plead *not guilty* to an action for the same fact, as he shall (b) be where the entry is *quod cognovit indictmentum*.

(a) 9. H. 6. 60.
Ab. F. Estop-
pel 24.
11. H. 4. 65.
21.
Lamb. b. 4.
c. 9.
Farresly 40.
(b) Sup. § 2.

Sec. 4. I take it for granted, that no confession whatever shall, before final (c) judgment, deprive the defendant of the privilege of taking exceptions in arrest of judgment to faults apparent in the record; (d) for the judges must *ex officio* take notice of all such faults, and any one, as *amicus curiæ*, may inform them of them.

(c) 1. Salkeld
77, 78.
Farresly 100.
(d) Finch 226.
2. Danv. Ab.
152.
2. Levinz 123.

Sec. 5. It seems to be taken for granted, both by (e) *Brook* and (f) *Staundforde*, (g) *Coke* and (h) *Hule*, speaking, as I suppose, of a general demurrer, that it amounts so far to a confession of the indictment as laid, that if the indictment be good, judgment and execution shall go against the prisoner. But it is observable, that no adjudged case is cited for the maintenance of this opinion, nor any authority from the old books except THE YEAR-BOOK of 14. *Edw. 4. 7. a. pl. 10.* (1) in which it is reported to have been said by *CHOKE*, that if a defendant demur to a plea, he shall be hanged; *quod fuit concessum*. But to this it may be said, that it was only spoken incidentally, and not a point adjudged; and besides that, it is so short and obscure that it is scarce intelligible, which appears by *Brook's* abridging it in different senses; for in one place (i) he seems to understand it of a demurrer by a defendant to a plea in bar, which seems impossible; and in another (k) place he seems to understand it in a different sense. And therefore perhaps the meaning of it may be only this, that after a defendant hath pleaded such a bar as confesses the fact, and concludes him to plead the general issue afterwards, as some pleas are said (l) to do; if he afterwards demur to a replication to such plea, he shall be condemned, if the demurrer be adjudged against him, and the indictment or appeal be good.

(1) Hale says, this authority must be taken *cum grano salis*.
2. Hale 257.
Vide also 225.
and 4. Comm.
328. where it is said, that although a man may in some cases lose his property, yet the law will not suffer him by such necessities to lose his life. However, upon this doubt, demurrers to indictments are seldom used: since the same advantages may be taken upon *not guilty* or in arrest of judgment. (i) B. Demurrer 17. (k) B. Peremptory 86. (l) Vide sup. c. 23. sect. 137.

(e) B. Peremptory 86.
(f) S. P. C.
150.
(g) 2. Inst.
178.
(h) Sum. 243.
2. Hale 315.
(i) Hale says, this authority must be taken *cum grano salis*.
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Señ. 6. But howsoever the law may stand in relation to a (a) general demurrer concluding in bar of an appeal, or indictment, as in common demurrers in civil actions, or a demurrer to a plea in bar, (b) which admits the fact, or to a (c) replication to such a plea, it hath been adjudged, that if an appellee demur in law to an appeal by reason of the insufficiency of the declaration, or generally demur to the declaration, with a (e) conclusion "*et petit judicium de narratione illâ et quod narratio illa cassetur;*" or, having prayed (f) oyer of the writ and process, demand judgment of the appeal, "*quia dicit quod breve de appello prædict. et process. inde minus sufficient in lege existunt ad ipsum W. C. ad dictum breve de appello respondere compellend;*" et hoc paratus est "*verificare prout cur;*" &c. unde petit judicium de brevi de appello prædict. et petit inde allocationem, et quod breve illud de appello cassetur;" such demurrer shall not conclude him from pleading over to the felony, either at the same time (g) with the demurrer, or (h) after it shall be adjudged against him.

(a) See the precedent section.
(b) Vide B. Peremptory 86.
(c) F. Cor. 12.
(d) Vide B. Peremptory 86.
(e) Dyer 38, 39.
(f) Cro. Eliz. 196.
(g) As it was done in the case of Smith v. Bowen, Mich. 7. Ann. Vide Salkeld 59.
(h) As it was done in the case of Wid-drington and Charlton, Hil. 10. Ann. (g) Smith and Bowen, Mich. 7. Annæ; in which case the demurrer was continued on the record with a *casset trialio exitus*, &c. and after the demurrer was determined against the defendant, a *venire* was awarded. (b) Dyer 38. Salkeld 59, 60. Cro. Eliz. 196.

Señ. 7. But it seems, that in criminal cases not capital, if the defendant demur to an indictment, &c. whether in abatement or otherwise, the Court will not give judgment against him to answer over, but final (i) judgment. For it seems, that in such cases there can be no demurrer properly in abatement, except (k) it be to a plea in abatement, or to a (l) replication to such a plea.

Señ. 8. A demurrer to an appeal hath been (m) received after issue joined: but it hath been adjudged, (n) that a demurrer to an indictment ought not to be received after verdict.

(i) Vide Salk. 220.
(k) Salk. 218.
(l) Rastal 160. 611.
(m) Cro. Eliz. 196.
(n) 1. Sider. 208. wherein the precedent in Co. Ent. 363. to the contrary is denied to be law.

CHAPTER THE THIRTY-SECOND.

OF SANCTUARY.

BEFORE I consider in the third place, how a prisoner is to be demesned upon his pleading, I shall examine the nature of the several kinds of PLEAS in *criminal cases*; which are either *Dilatory*, or in *Chief*.

DILATORY PLEAS are either *Declinatory*, or, in *Abatement*.

DECLINATORY pleas are :

1. Of the privilege of sanctuary.
2. Of the benefit of clergy.

Señt. 1. As to the plea of the "*privilege of sanctuary*," 27. Hen. 8. c. the learning relating to it, being made in a great measure ^{19.} useless by the statute of 21. Jac. 1. c. 28. f. 7. by which it is ^{32.} enacted, "That no sanctuary, or privilege of sanctuary, ^{12.} shall, after that time, be admitted or allowed in any ^{3.} case;" I shall but briefly consider it under the following ^{39.} heads : ^{4.} Comm. 326. ^{358.} 429.

Vide also 9.
Geo. 1. c. 28.

for suppressing the pretended privileged place in Saint George's Fields called *the Mint*. And also 11. Geo. 1. c. 22. for suppressing another pretended sanctuary of the same nature in the hamlet of *Wapping, Stepney*. by which acts all resistance is made felony and transportation for seven years. Vide also 8. and 9. Will. 3. c. 27. for suppressing many other pretended sanctuaries from civil process, where the same punishment is inflicted upon the offenders.

1. What was the nature of the privilege of sanctuary.
2. What authority was necessary for the creating it.
3. To what matters it extended.
4. At what time, and in what manner, it was to be pleaded.

As to THE FIRST POINT, *viz.* What was the nature of the privilege of sanctuary.

(a) Finch 374. *Sett.* 2. It seems to be agreed, *(a)* that so far as a place S. P. C. 108. was allowed to have it, it gave all those that fled to it for a safeguard, and continued within its *(b)* precincts, a *(c)* freedom from being apprehended, or compelled to answer in any court of justice, and a right to be remanded if taken out against their will. *(b)* What those precincts were, Keilway 189. 191. 9. H. 7. 20. S. P. C. 113. B. Sanctuary 10. *(c)* Keilw. 188, 189, 190, 191. 8. H. 6. 4. Ab. F. Cor. 5. 1. H. 7. 23. Ab. F. Cor. 49. 9. E. 4. 28. Ab. F. Cor. 32. Keilway 107. 188.

As to THE SECOND POINT, *viz.* What authority was necessary for the creating it.

(d) 32. H. 8. *Sett.* 3. It seems, that it belonged of common *(d)* right to every church and churchyard for the space of forty days, but could not be claimed for a longer time, either by force of any bull from THE *(e)* POPE, nor even by *(f)* prescription, *(g)* especially in the case of high treason; but only by a grant *(h)* from the king, made, or at least confirmed *(i)* or allowed *(k)* in *eyre*, since the time of memory. But it is said, that it did not gain *(l)* the name of a sanctuary till it had THE POPE's bull, though it had the *(m)* full privilege of one, as to all exemption from temporal courts, by the king's grant only. *(d)* 32. H. 8. c. 12. Finch 388. 3. H. 7. 12. Ab. F. Cor. 54. 21. E. 3. 17. Ab. B. Sanct. 2. Sup. c. 9. sect. 44. Keilw. 189. B. Sanct. 11. 14. 16. Raftal 583. *(e)* Keilw. 189, 190, 191. S. P. C. 110, 111. B. Sanct. 6. 15. 5. Coke de Jure Regis Eccles. 26. *(f)* 1. Inst. 114. Keilway 188, &c. But *quære* if such prescription were confirmed by king, or allowed in *eyre* since time of memory. Keilway 188, 189, 190, 191. *(g)* S. P. C. 112. 1. H. 7. 23. 25, 26. Ab. F. Cor. 49. Prescription 20. Vide Raftal 584. *(h)* S. P. C. 108. 110, 111. 1. H. 7. 25, 26. B. Sanct. 7. Keilw. 189, 190, 191. *(i)* Keilw. 189, 190. 1. H. 7. 23. 2. R. Abr. 268, 269. *(k)* Keilw. 189, 190. 2. R. Abr. 268, 269. 1. H. 7. 23. B. Sanct. 7. 15. This is made a *quære*, S. P. C. 112. *(l)* Finch 373. *(m)* Finch 374, 375.

As to THE THIRD POINT, *viz.* To what matters it extended.

Sett. 4. It seems agreed, that it never was any farther a protection against any action merely civil, *(n)* than to save the defendant from execution of his body. Also it seems to be generally agreed, that if it were granted by general words, it extended not to *(o)* high treason. But it seems agreed, *(p)* that in such case it extended to all felonies except *(q)* sacrilege. Denied 29. Aff. 24. Ab. F. Grant 77. B. Sanctuary 6. 1. H. 7. 23. 25, 26. Ab. F. Cor. 49. Prescription 20. Cont. Keilway 190, 191. Qu. Finch. 374. *(p)* See the books cited to the other parts of this section. *Quære* if in such case it extended to petit treason. B. Sanct. 2. *(q)* 3. Inst. 115. Fitz. 420.

lege, and to all inferior crimes except such as were committed by a sanctuary man (a) within the sanctuary, or even (a) Agreed by all the canonists.
(b) out of it, *sub spe redoundi*.

Keilway 191. (b) Denied by many of the canonists. Keilway 191.

As to THE FOURTH POINT, *viz.* At what time, and in what manner, it was to be pleaded.

Scet. 5. It seems agreed, that the defendant lost the benefit of it, unless he pleaded it before any (c) other plea, (c) S. P. C. and properly made out his case; but for this matter I shall wholly refer the reader to the old (d) books. 113.

F. Cor. 438.

B. Sanct. 5.

21. E. 3. 17. 21.

Ab. B. Sanct. 2. F. Corone 447. 9. E. 4. 28. Ab. F. Cor. 32. (d) Keilw. 90.
107, 108. 189. S. P. C. 113. 1. H. 7. 23, 24, 25, 26. 9. H. 7. 20. Rastal's Entries,
581. 683.

Scet. 6. The learning of ABJURATION, (e) depending much upon that of sanctuaries, and seeming to be of very little use at this day, I shall refer to STAUNDFORDE'S PLEAS OF THE CROWN, Book 2. chap. 40. and to what hath been said already concerning that matter in the chapter concerning Coroners, section forty-four, 115.

F. Aiel 5.

CHAPTER THE THIRTY-THIRD.

OF THE BENEFIT OF CLERGY,

FOR the better understanding the nature of the benefit of clergy, or rather of the (a) statute at this day, I shall endeavour to shew: (a) See the latter part of this chapter.

4. Comm. 327. 358. 406. 422.

1. By what kind of persons it is demandable.
2. For what crimes clergy is demandable.
3. At what times clergy is demandable.
4. Whether it shall be allowed where it is not demanded.
5. Who is to judge whether the person who demands it have a right to it or not.
6. How far the ordinary was punishable at law for demanding or refusing a clerk against law.
7. In what manner at the common law a clerk was to be delivered to the ordinary, and what is to be done to him afterwards.
8. What is to be done to him at this day, and how far it shall be to his benefit.

AS TO THE FIRST POINT, viz. By what kind of persons the benefit of clergy, or rather of the statute at this day, is demandable.

SECT. 1. It may not be improper to look a little back into the original of clergy, whereby we shall find, that anciently the clergy (b) strongly insisted, that by the law of GOD their persons were so sacred, that they could not, without a violation of that law, be convened before, and much less be punished with the loss of life, or member, by any secular judge, for any crime whatsoever. But there seems to be so little colour for any pretence of this kind from scripture, that I almost wonder how it was possible that any persons could be so far prejudiced, as seriously to be persuaded that it is deducible from thence.

(b) Keilw. 181. 185.
2. Hale 323.
330, &c.

(a) See Lyndw. book 2. in the chapter *de foro competente*.

Kelynge 99. 101, &c.

S. P. C. 123, 124.

Finch 462.

(b) Keilway 121, &c.

5. Coke de

Jure Regis Eccles. 12, &c. 1. Hale 325. 1. Comm. 14. 4. Comm. 414.

Sec. 2. But it seems agreed, (a) that all persons in holy orders have this privilege by the canon law. But this law being no farther in (b) force here than as it hath been received, and is consistent with the common or statute law, it will be proper to shew how far it hath been received, and is consistent with those laws; which I shall at present consider under this head, so far as it relates to the persons intitled to this privilege; and shall farther consider it as to other matters, in the following part of this chapter.

Sec. 3. It seems agreed, that before the statute of *Articuli Cleri*, c. 15. made in the ninth year of *Edward the second*, it was (c) generally denied to those who had abjured, or who had any other way confessed themselves guilty. But by a favourable interpretation of that statute, which expressly extends only to those who fly to the church for safeguard, it hath been allowed (d) to all those who have confessed themselves guilty upon their arraignment or otherwise, in the same manner as if they had not confessed.

(c) F. Corone 355.

11. Coke 29.

S. P. C. 124.

Keilway 186.

Seld. Ja. Ang.

c. 10.

(d) B. Clergy

5. 7. 8.

9. E. 4. 28. 8. H. 4. 3. 1. Affize 27. H. 6, 7. F. Corone 191.

(e) Kelynge 99, 100.

(f) Lindw.

b. 2. c. *de foro competente*.

(g) See ft.

Marl. c. 28.

West. 1. c. 2.

Art. Cleri, c.

15. and the old

books cited

1. Inst. 633,

634, &c.

(b) Keilw.

181.

Kelynge 99,

100.

(i) Kelynge

99, 100.

(k) F. Cor. 233.

F. Corone 117.

Sec. 4. Also it seems, that notwithstanding the clergy (e) contended, that the word "*clericus*" (which is the word generally used by the (f) canon law, as well as ours, (g) to express those who are entitled to this privilege) did include those of the inferior orders, as well (h) as bishops, priests, and deacons; yet it seems, (i) that the temporal judges sometimes denied it to those in inferior orders, as well as to mere (k) laymen, before the statute of 25. Edw. 3. c. 4. which reciting, "that the prelates had grievously complained, that secular clerks, as well chaplains as other monks, and other people of religion, had been drawn and hanged by award of the secular justices, in prejudice of the franchise of holy church, &c." doth enact, "that all manner of clerks, as well secular as religious, &c. shall freely enjoy the privilege of holy church, &c."

But they sometimes allowed it to mere laymen, being able to read.

Sec. 5. It seems, that by a favourable interpretation of this statute, which universally prevailed soon (l) after it was made, not only those actually admitted into some inferior order of the clergy, (m) but also those who were never qualified to be admitted into orders (which was (n) tried by *non facit clericum nisi habeat sacram tonsuram*. 26. Affize 19. Ab. F. Corone 191. S. P. C. 124. 2. Hale 372, 373. (m) Kely. 100, 101, 102. B. Clergy 7. 20. (n) Kelynge 100, 101. Finch 462, 463. S. P. C. 133. 34. H. 6. 49. F. Corone 44. See the cases cited to the fourth general point of this chapter.

putting

putting them to read a verse), have been taken to have a (a) right to this privilege, as much as persons in holy orders, whether they were persons lawfully born or (b) bastards, (c) aliens or denizens, in the communion of the church or (d) excommunicate, within the common benefit of the law or (e) outlaws, &c. so that they were not (f) heretics convict, nor (g) Jews, Mahometans, nor Pagans; nor under (h) perpetual disability of going into orders; admitting of no dispensation, as (i) blind and maimed persons formerly were, and women (k) still are; nor liable to the objection of bigamy, viz. of having (l) married two different women successively, or a widow, which by a constitution of the Council of Lyons, (m) received in this kingdom, was a bar to the demand of the privilege of the clergy; and by force of 18. Edw. 3. c. 2. was triable by the certificate (n) of the bishop.

(a) 9.E. 4. 18. Ab. B. Clergy 7. (b) B. Clergy 22. (c) 2. Hale 373. (d) B. Clergy 20. (e) B. Clergy 20. (f) Summary 229. (g) 11. Coke 29. (h) See 3. & 4. W. & M. 9. (i) 11. Coke 29. (j) 11. Coke 29. (k) 11. Coke 29. (l) 11. Coke 29. (m) 11. Coke 29. (n) 11. Coke 29.

Sec. 6. But it is expressly enacted by 1. Edw. 6. c. 12. f. 16. "That any person who by the law of this realm ought to have the benefit of his clergy, shall be admitted to it, although he have been divers times married to any single woman, or to any widow or widows, or to two wives or more." But it bore some (o) question whether this statute were not impliedly repealed by 1. & 2. Philip and Mary, c. 8. while it stood in force, which repealed all clauses, &c. against the *See of Rome*.

(o) S. P. C. 134. Dalison 21. Dyer 203. B. Clergy 20. Summary 223. 2. Hale 372.

† *Sec. 7.* But still all persons not capable of holy orders, as WOMEN, who from the delicacy of their frame seem to be most susceptible of human passions, and some others, were left to the extreme rigour of the common law, and to the mercy of the crown; for at common law, all felonies except petit larceny, rape, and mayhem, were considered as capital offences, unless in cases where the offender was capable of holy orders, and qualified for them. But it is enacted by 21. Jac. 1. c. 6. "That on a conviction of grand larceny under the value of ten shillings, being no burglary, nor robbery in or near the highway, nor a

In what cases WOMEN shall have the benefit of clergy, Foist. 305.

"felo-

"felonious private taking from the person, &c. but only
 "such an offence for which a man might have his clergy,
 "they shall be burnt in the hand, and imprisoned, &c."

Sec. 8. But it is enacted by 3. & 4. Will. & Mary, c. 9.
f. 7. "That where a man being convicted of any felony
 "may demand the benefit of his clergy, if a woman be
 "convicted for the same or the like offence, upon her
 "prayer to have the benefit of this statute, judgment of
 "death shall not be given against her upon such conviction,
 "or execution awarded upon any outlawry for such of-
 "fence; but she shall suffer the same punishment as a man
 "should suffer, that has the benefit of his clergy allowed
 "him in the like case; that is to say, shall be burnt in the
 "hand by the gaoler in open court, and further be kept in
 "prison for such a time as the justices in their discretion
 "shall think fit, so as the same do not exceed one year's
 "imprisonment."

The Case of
 the Duchefs
 of Kingston
 for bigamy,
 11. State
 Trials 262.

+ But it has been determined upon the construction of these
 statutes, that a peeress convicted by her peers of a clergyable
 felony, is by law intitled to the benefit of the statutes, so as
 to excuse her from capital punishment, without being burnt
 in the hand or being liable to any imprisonment.

(a) S. P. C. *Sec.* 9. It seems, (a) that one who had been guilty of
 31. 32. 123. sacrilege, or of breaking the prison of the ordinary, had no
 124. 133. right to the benefit of clergy, but at the (b) discretion of the
 F. Corone 112. ordinary.
 117. 120. 250.

257.
 4. Inf. 314. 12. Affize 39. Ab. B. Clergy 10. 17. Affize 4. 17. E. 3. 13.
 Ab. F. Corone 112. 9. E. 4. 28. Ab. B. Clergy 7. 27. Affize 42. Ab. F. Cor. 205.
 B. Clergy 13. 11. Coke 29. (b) Yet it seems to be holden, 26. Affize 19. 27.
 Ab. B. Cler 11. 12. F. Corone 191. 193. that one who had been guilty of
 sacrilege might demand it as well as any other. 2. Hale 333. 366. And it seems
 to be holden, F. Corone 232. 250. 257. 419. 2. Hale 372. that one who had
 broken the prison of the ordinary had no manner of right to it. 12. Affize 39.
 Ab. B. Clergy 10. This point is made a *quere*. 9. Edw. 4. 28. pl. 40. Ab. B.
 Clergy 7.

(c) Sum. 230. *Sec.* 10. It seems clear, (c) that before the statute of
 S. P. C. 31. 4. Hen. 7. c. 13. he who had been admitted to the benefit
 32. 107. 124. of clergy, might have it a second time as well as the first,
 135. unless he had broken the prison of the ordinary, to which
 See Pre. 4. H. 7. c. 13. he was committed when clergy was first allowed him; in
 But 17. Aff. which case it seems, (d) that he could not save himself from
 ize 4.
 17. E. 3. 13. 17.
 Ab. F. Corone 112. it seems to have been doubted where the clerk was attainted
 before he first had the benefit of clergy. (d) F. Corone 232. and the books cited to
 let in (b), and to the former section.

a second prosecution, though for the very same felony for which he was before convicted, unless he could shew a purgation.

Stat. 11. But by 4. Hen. 7. c. 13. it is enacted, "That every person, not being within orders, who hath once been admitted to the benefit of his clergy, afterwards arraigned of any offence, be not admitted to have the benefit or privilege of the clergy, &c."

And by 4. Hen. 7. c. 13. it is provided, "That if any person at the second time of asking his clergy, because he is within orders, hath not there ready his letters of his orders, or a certificate of his ordinary, witnessing the same; that then the justices afore whom he is so arraigned, shall give him a day by their discretion to bring in his said letters or certificate; and if he fail, and bring not at such a day his said letters or certificate, then the person to lose the benefit of his clergy, as he shall do that is without orders."

Stat. 12. But by 28. Hen. 8. f. 7. it is enacted, "That persons within holy orders shall be under the same pains and dangers for the offences referred to by that statute, and be used and ordered to all intents and purposes, as other persons not being within holy orders."

And by 32. Hen. 8. c. 3. f. 8. it is further enacted, "That persons within holy orders who shall be admitted to their clergy, shall be burnt in the hand in like manner as lay clerks, and shall suffer and incur all such pains, dangers, and forfeitures, and be ordered and used for their offences of felony, to all intents, purposes, and constructions, as lay persons admitted to their clergy be, or ought to be, &c."

Stat. 13. But by 1. Edw. 6. c. 12. f. 10. it is enacted, "That in all cases of felony, other than those in that act mentioned, every person who shall be found guilty, or confess, or stand mute, or not answer directly, shall have the benefit of his clergy, in like manner and form as before the first year of King Henry the eighth."

And therefore it seems plain, that where *lay persons* are not excluded from the benefit of clergy the first time, persons in holy orders may have it as often as they want it, in the same manner as they might upon the foot of the said statute

(a) Sum. 238, statute of 4. Hen. 7. c. 13. (a) except they shall be outlawed, or challenge above the number of twenty, in which case they are not within the purview of 1. Edw. 6. which extends only to those "who shall be found guilty, or confessed, or stand mute, &c." But (b) where the crime itself charged against a person in holy orders, is, by any statute, generally excluded from clergy, such person shall no more have the benefit of it than he were a mere layman.

239.
S. P. C. 135.
(b) S. P. C. 135, 136.
Sum. 235, 236.
Vide 2. Hale
374- 376. 339.
341, 342. 345.

Stat. 14. By 34. and 35. Hen. 8. c. 14. it is recited, "That divers persons had been indicted and attainted, and some of them clerks convicted, and some of them clerks attainted, &c. before justices of peace, gaol-delivery, &c. within divers cities, counties, and franchises, &c. the records of which attainders and convictions often, by negligence of the clerks, &c. having the rule and keeping thereof, had been embezzled, and not ready to be objected against such persons, being newly arraigned before other justices, &c. And for that it hath not been known certainly whither to resort for the same records, because they were not certified into any place certain, such offenders had often had the benefit of the clergy where they ought not, &c." And thereupon it is enacted, "That the clerk of the crown, clerks of the peace, and clerks of assize, where any such attainder or conviction shall be so had, shall certify a transcript, briefly containing the effect of every such indictment, &c. and clerk attainted, &c. that is to say, the name, surname, and addition of every such person, &c. and the certainty of the offence, &c. and the day and place of his attainder or conviction, &c. and the day and place of his offence, &c. before the king in his bench at Westminster, there to remain of record for ever, within forty days after such attainder, &c. if the Term be then, and if not, then within twenty days after the next Term, &c. on pain of forty shillings, &c. And that the clerk of the crown in the king's bench shall receive the same without fee, under the like pain."

Stat. 15. By 34. & 35. Hen. 8. c. 14. it is provided, "That if there be more persons contained in any such indictment, other than such person so attainted or convicted, that then such clerk shall certify such transcript only (c) concerning the person or persons so attainted or convicted, which shall be as effectual against such person and persons against whom it shall be objected, alledged, or pleaded, as if the very record were present."

(c) Omitted in Keble's Statutes; but inserted in Ruffhead's.

Sett. 16. And by 34. & 35. Hen. 8. c. 14. it is farther enacted, " That the said clerk of the crown in the king's bench, at all such times as the justices of the gaol-delivery, or justices of the peace, in every county within this realm of *England*, do write unto him for the names of such persons, which be so attained or convicted, and certified in the said bench, shall incontinently certify the said names and surnames of the said persons, with the causes why and wherefore they were convicted or attained, unto the justices of gaol-delivery, or justices of the peace, &c. on pain of forty shillings."

Sett. 17. But by 34. & 35. Hen. 8. c. 14. it is provided, " That this act shall not extend to the clerks of the crown, &c. in *Wales* or *Chester*, or counties palatine of *Lancaster* and *Durham*, to make any transcript of any such attainder or conviction before the king's justices of his counties in *Wales*, &c."

Sett. 18. It seems, (a) that the justices may, by force of this act, write, in their own names, to the clerk of the crown in the king's bench, for a certificate of the transcript of an attainder or conviction, and need not do it by writ in the king's name under their *teste*, &c. which is required (b) by the construction of 2. & 3. Edw. 6. c. 24. where the justices of one county write to those of another for the certificate of the attainder or acquittal of the principal, in order to proceed against the accessory. And the reason of the difference is, because in this last case justices write to justices, but in the former to an officer only. (a) *Dyer* 253.
(b) *Sup. c.* 29.
sect. 53.

Sett. 19. By 3. & 4. Will. and Mary, c. 9. s. 7. it is farther provided as followeth: " Forasmuch as such men and women who have once had their clergy, &c. may happen to be indicted for an offence committed afterwards in some other county:" Be it therefore enacted, " That the clerk of the crown, clerk of the peace, clerk of the assizes, where such man or woman shall be convicted, shall at the request of the prosecutor, or any other in his majesty's behalf, certify a transcript briefly, and in few words, containing the effect and tenor of every indictment and conviction of such man or woman, of his or her having the benefit of the clergy, &c. and addition of every such person or persons, and the certainty of the felony and conviction, to the judges and justices in such other county where such man or woman shall be indicted; which certificate being produced in court, shall
" be

“ be sufficient proof that such man or woman have before
 “ had the benefit of clergy, &c.”

Against the defendant's prayer of clergy the prosecutor may file a **COUNTER PLEA**, alledging some fact which, in law, deprives the defendant of the privilege he claims. Thus, before the statute *de Bigamis*, the offender on a conviction for bigamy in the temporal courts, was allowed his clergy; but this privilege having been taken away by the Pope at the Council of Lyons, (vide ante, sect. 5.) the practice was to enter a **COUNTER PLEA** stating the offence to have been committed within a certain diocese; which allegation carried the trial of the fact into the ecclesiastical court, and upon a certificate of the truth of it from the bishop, the offender was ousted of his clergy. To this counter-plea, however, the prisoner might reply, that the first marriage was made within the age of consent, and that he disagreed to it on his attaining to maturity; and the issue taken on this replication being triable by the country and not by the bishop, restored the offender to clergy. Staundforde 134. 4. Inst. 274. 2. Hale 373. Thus also it is a good counter plea to the prayer of clergy, that the offender is not entitled to the benefit of the statute in such case made and provided, because he was before convicted of an offence, and thereupon prayed the benefit of the statute, which was allowed to him, alledging the truth of the fact, and praying the judgment of the Court, that he may die according to law; which fact is to be tried by the record in pursuance of 34. and 35. Hen. 8. c. 14. Staundforde 135.—Divers other counter pleas also by which an offender may be deprived of clergy may be framed from a consideration of the persons to whom it is allowed or denied by the common law, and of the circumstances under which that allowance or denial of it has been placed by divers acts of parliament. Staundforde 138.—The use of this counter plea, however, had for many years become obsolete and out of practice; no traces of it appearing in any of the books since the time of Sir William Staundforde, who was chief justice of the king's bench in the reign of Queen Elizabeth. But the daring practices of some money coiners have occasioned its revival, and accordingly in the case of the King v. Marston Rothwell and Mary Child, who were convicted for coining, at the Old Bailey, in September sessions 1783, before Mr. Justice Ashurst, Mr. Silvester filed a **COUNTER PLEA** of record on the part of the prosecution, alledging that they had been before allowed the benefit of the statute, &c. and the offenders were thereby ousted of their clergy.

As to THE SECOND POINT, viz. For what crimes the benefit of clergy, or rather of the statute, may be demanded; I shall premise,

SECT. 20. FIRST, That it seems to be generally agreed, that by the common law, it is demandable as well upon an
 (a) 11. Coke (a) appeal as indictment; for any crime whatsoever which
 19. subjects the offender to the (b) loss of life or member, ex-
 (b) S. P. C. cept (c) high treason (whether against the king's person or
 124. (d) not), and sacrilege; for the first of which the common
 B. Clergy 19. law seems to give the offender no manner of right to the
 Finch 461, benefit of his clergy, and for the latter to have it left to the
 463. discretion of the ordinary, as hath been more fully shewn
 (c) S. P. C. in the ninth section.
 124.
 F. Corone 283.

19. H. 6. 47. At. F. Corone 8. B. Clergy 6. Vide 2. Inst. 634. And all new created treasons which in judgment of law are levelled at the person of the king or his royal majesty, are excluded without special words for that purpose, as coming within the exception of the statute *de Clero*. Foster 190. (d) So it appears from the books cited to letter (c). Yet in Summery 330. and 111. Coke 19. and B. Clergy 25. 31. it seems to be holden, that by the common law clergy was excluded from such high treason only as was against the person of the king. But *quære* upon what ground this is holden. And see 25. E. 3. *de Clero*, c. 5. and 2. Hale 332. and Foster 191.

Señ. 21. SECONDLY, That it seems to be doubtful, (a) whether it were demandable at the common law for petit treason. But this was settled by 25. Edw. 3. *de Clero*, c. 4. which expressly allows it for "any treasons or felonies touching other persons than the king himself, or his royal majesty." (a) S. P. C. 124. Summary 230. Finch 463. 11. Coke 29.

Señ. 22. THIRDLY, That after this a construction prevailed, that clergy might be denied to felons charged as *insidiatores viarum, et depopulatores agrorum*. But this is remedied by the fourth of Henry the fourth, chapter the second. (b) Sup. c. 25. sect. 59. S. P. C. 124. 2. Hale 328. 333.

From these premises it seems to be generally agreed, (c) that the following conclusions necessarily follow: (c) Sum. 230. 231.

Señ. 23. FIRST, So far as a person, who in respect of his orders or learning, or otherwise, is qualified to be admitted to the benefit of clergy, is denied it in respect of his (d) crime, not amounting to high treason or sacrilege; such denial must be grounded on some act of (e) parliament made since the twenty-fifth of Edward the third. (d) S. P. C. 124, &c. Sum. 232, &c. (e) 2. Hale 332. Summary 230.

Señ. 24. SECONDLY, Wherever an offence is made felony by statute, it (f) shall have the benefit of clergy, unless it be expressly excluded from it. (f) Sum. 230. 2. Hale 330. 334.

Señ. 25. THIRDLY, Wherever a person is denied the benefit of clergy, in respect of a statute, excluding it from the crime charged against him, the (g) indictment or appeal, and the (h) evidence thereon, must expressly bring his case within the words of such statute. And therefore, if a (i) murder be not expressly laid, and proved to have been done of *malice prepense*; and the offence of an accessory (k) before, to have been done *maliciously*; and that of a (l) cut-purse *clam et secretè à personâ, &c.* the offender shall have his clergy. And agreeably hereto it hath been adjudged, (m) that an indictment of robbery "*in quadam viâ regiâ pedestri ducent de London ad Islington*," shall not oust the defender of the benefit of his clergy; because the words of the statute (n) to this purpose are *in, or about, or near the highway*. (g) Sum. 231. 2. Hale 336. 344. 11. Coke 37. S. P. C. 114. 130. (h) S. P. C. 130. Dyer 261. 224. (i) Sum. 231. S. P. C. 130. Dyer 261. Vid. 23. H. 8. c. 1. E. 6. 12. sect. 10. (k) Sum. 231. 4. (l) Sum. 231. c. 1. sect. 3. 1. Edw. 6. c. 12. Par. 10. 4. & 5. Ph. and M. 4. But by 2. and 3. Will. and Mary, c. 9. the benefit of clergy is taken away generally from the crime of robbery, and therefore an indictment without these words would now perhaps be good.

(a) 1. And
195.

Foster's Cro.
Law 126. 131.

Yet it hath been adjudged, (a) that an indictment against a man as accessory to a murder before the fact, by the words *malitiosè excitavit, movit et procuravit, &c.* is sufficient to oust the offender of the benefit of clergy, by force of 4. & 5. Philip and Mary, the words whereof are, "that all persons who shall maliciously command, hire, or counsel any person, &c." which are not expressly pursued in such indictment. But the counselling another being necessarily included in the *moving, procuring, and exciting him*, which therefore are tantamount in sense and different only in the manner of expression, such an indictment is as (b) much within the statute as if it followed the very words.

(b) See B. 1.
c. 32. sect. 3.

(c) See B. 1.
c. 30. sect. 9.
1. Ventris 13.
2. Hale 191.

Also it hath been (c) adjudged, that in order to oust a man of the benefit of clergy by force of a statute which takes it away from a capital offence at common law, there is no need that the indictment or appeal conclude *contra formam statuti*, because the statute doth no way alter the nature of the offence, but only leaves it to its proper judgment, and takes away a personal privilege or exemption from such judgment.

(d) See B. 1.
c. 3. sect. 4.
c. 30. sect. 7.
Sum. 7. 8. 231.
2. Hale 335,
336.
11. Coke 29.
to 36.
1. And. 195.
Dyer 99. 183.
See 4 & 5. Ph.
& M. 4.
Foster 355 to
358.
(e) 11. Coke
29. to 36.
Savil 46.

(f) Summary
587.
2. Anderson
195.
Dyer 99. 183.
Foster 355 to
360.

Sect. 26. FOURTHLY, A statute excluding the principals from the benefit of clergy, doth (d) not thereby exclude the accessories before or after. Neither (e) doth a statute excluding the accessories thereby exclude the principals. And it seems agreed, (f) that where a statute excludes those from the clergy who shall *be found guilty* of petit treason, murder, burglary, robbery, or any other kind of crimes, it shall be construed to intend only to exclude the principals, and not accessories before or after, notwithstanding they are certainly in a high degree partakers in *the guilt* of the principal offender, as hath been more fully shewn Chapter 29, sections 13, 14. Yet inasmuch as such statutes, taking away a privilege of so high a consequence to the subject, ought to receive the strictest interpretation, and the words of them may, without any manner of strain, or repugnance to the general rules of law, be taken in such a sense as will include the principals only, I do not know that they have ever been carried farther.

(g) Sum 232.
25. H. 8. 3.
c. 2.
Sup. c. 30.
sect. 24.

Moorc 550. Con. F. Corone 283. (b) 3. H. 7. 12. Ab. B. Clergy 27. F. Corone 51. Sum. 231. 25. H. 8. c. 3. f. 2. 3. & 4. W. & M. c. 9.

outlawed,

(a) outlawed, &c. as to one who is convicted by verdict, or confession, &c. (a) 11. Coke 29.
See 3. & 4. W. & M. c. 9.

Seft. 28. SIXTHLY, A statute taking the benefit of clergy from those who shall be *found guilty*, doth not (b) thereby take it from those who stand mute, or challenge peremptorily above the number of twenty, or are outlawed, &c. (b) See 25. H. 8. c. 3. sect. 2. 3. & 4. W. & M. c. 9.
11. Coke, Poulter's Case. 2. Hale 335.

Seft. 29. SEVENTHLY, But it seems (c) clear, that a statute taking it away from those who shall be *found guilty*, extends as well to those who shall confess themselves guilty upon record, as to those who shall be found guilty by verdict; for as the latter are found guilty by a jury, so are the former by the Court, and their conviction being from their own mouths, is of the highest nature possible. (c) 11. Coke 29.

AND now I shall endeavour to shew for what crimes persons are excluded from the benefit of clergy by statutes made since 25. Edw. 3. c. 4. which being somewhat perplexed and intricate, I shall for the better clearing of this matter, first take a general view of those statutes so far as they are in force at this day, and then shall more distinctly consider them as they particularly concern the several kinds of capital crimes.

Seft. 30. The first of those statutes I shall take notice of, is 23. Hen. 8. c. 1. f. 3. by which it is enacted, "That no person who shall be found guilty after the laws of this land for any manner of petit treason, or for any wilful murder of malice prepensed,—or for robbing any churches, chapels, or other holy places,—or for robbing of any person or persons, in their dwelling houses, or dwelling place, the owner or dweller in the same house, his wife, his children, or servants, then being within, and put in fear and dread by the same,—or for robbing of any person or persons in or near about (d) the highways,—or for wilful burning of any dwelling houses or barns, wherein any grain or corn shall happen to be,—nor any person or persons being found guilty of any abetment, procurement, helping, maintaining, or counselling of or to any such petit treasons, murders or felonies, shall be admitted to his clergy; such as be within holy orders only excepted." (d) So Rastal's Statutes; but Pulton omits the word about, and Keble the word near.

Seft. 31. NOTE, That this statute extends (e) as well (e) 11. Coke 30. to appeals as to indictments and to those who shall confess, 2. Hale 335.

- (a) Sup. sect. 28. fess (a), as much as those who shall plead and be found guilty. For the words are general, "that no person who shall be found guilty after the laws of this realm, &c. shall be admitted to his clergy, &c." But it extends not (b) to persons outlawed, and was easily evaded (c) by persons brought to their trials, by standing mute or challenging peremptorily above the number of twenty, whereby they prevented their being found guilty.
- (b) 11. Coke 30.
- (c) See pream. 25. H. 8 c. 3. and 11. Coke 30.

Seet. 32. But these two last defects are provided for by 25. Hen. 8. c. 3. by which it is enacted, par. 2. "That every person who shall from thenceforth be indicted of petit treason,—wilful burning of houses,—murder,—robbery,—burglary, or other felony, according to the tenor and meaning of 23. Hen. 8. and thereupon arraigned, do stand mute of malice or froward mind, or challenge peremptorily above the number of twenty (d), or else will not, or do not answer directly to the same indictment and felony whereupon he is so arraigned, shall from thenceforth lose the benefit and privilege of his clergy, in like manner and form as if he had directly pleaded to the said petit treason, murder, robbery, burglary, or other felony, whereupon he is so arraigned, and thereupon had been found guilty, after the laws of the land."

- (d) This challenge now imports nothing as to the point of clergy, for the challenge is over-ruled. 2. Hale 339. 245.

- (e) 11. Coke 31. 1. Hale 573. *Seet. 33.* But this statute extends not (e) to those who are outlawed, any more than 23. Hen. 8. Neither doth it extend to appeals, nor to accessaries before, both of which are included in the twenty-third of *Henry the eighth*.

Seet. 34. After came the statute of 1. Edw. 6. c. 12. f. 10. "That no person who shall be in due form of the laws attainted or convicted of murder of malice premeditated, or of poisoning of malice premeditated, or of breaking of any house by day or by night, any person being then in the same house where the same breaking shall be committed, and thereby put in dread; or of robbing any person in the highway, or near the highway; or of felonious stealing of horses, geldings, or mares, or of felonious taking of any goods out of any parish church, or other church or chapel; or being indicted or appealed of any of the same offences, and thereupon found guilty by verdict of twelve men, or shall confess the same upon his arraignment; or will not answer directly according to the laws of this realm, or shall stand wilfully, or of malice, mute, shall not be admitted to the benefit of his clergy: And that in all other cases of felony all persons that shall be arraigned, or found guilty upon their

"their arraignment, or shall confess or stand mute in form aforesaid, or will not answer directly in form aforesaid, shall have their clergy in the same manner as before the first year of King *Henry the eighth*."

Seet. 35. NOTE, That this statute extends as well to (a) appeals as to indictments; in which respect it is more fully penned than 25. Hen. 8. and that it extends to persons in holy (b) orders, as much as to laymen, and to all persons attainted in general, and consequently to those who are outlawed, in which respects it is more fully penned than either twenty-third or twenty-fifth of *Henry the eighth*. Yet it hath several considerable defects; as

Seet. 36. FIRST, In that it doth not exclude those from the benefit of the clergy, who challenge above the number of twenty; so that it is easily made ineffectual (c) by taking such challenges as to crimes excluded from the benefit of clergy by this statute, and no other: But as to the crimes within 25. Hen. 8. it (d) seems plain, that a person that takes such challenges might be excluded from his clergy by force of that statute even before it was revived by 5. and 6. Edw. 6. set forth more at large sect. 42. &c. because 1. Edw. 6. restores the benefit of clergy; as it was before the reign of *Henry the eighth*, to such only as shall be found guilty, or confess, or stand mute, or not answer directly; and consequently (e) those who challenge above the number of twenty, seem clearly to be excluded, in the same manner as if the first of *Edward the sixth* had never been made.

Seet. 37. SECONDLY, In that it omits accessaries in the clause which takes away clergy, but includes them in that which restores it, which is general as to all cases of felony, not mentioned in the act, whereof any person shall be found guilty, and consequently as to accessaries wholly takes off the force of 23. Hen. 8. which extends only to those who shall be found guilty, and is the only statute in this reign which excludes accessaries from the clergy: And accordingly we find, (f) that after this statute accessaries were admitted to their clergy, in the same manner as before the reign of Hen. 8. till the making of 4. & 5. Ph. & Mary, set forth more at large section forty-five.

Seet. 38. THIRDLY, In that it also omits arson in the clause which takes away clergy, but includes it in the general words of that which restores it, and consequently re-entitled those (g) convicted of it to clergy, in all cases but that of challenging more than twenty, till the making of 5. & 6. Edw. 6. as shall be more fully shewn hereafter.

(a) 11. Coke
32.
2. Hale 343.
(b) 11. Coke
31, 32.

(c) 11. Co. 32.
Sup. sect. 27.
28. But S.
P. C. 126. it
is made a
quære whe-
ther those
who challenge
more than
twenty,
are not in-
cluded under
the word con-
vict.

(d) But in
11. Coke 31.
it seems to be
otherwise
holden.

(e) Vide Summ.
239.

(f) 11. Coke
31.
Dyer 133.

(g) 11. Coke
31, 32, &c.
Vide sup. f. 36.

Sect. 39. FOURTHLY, In that the clause which ousts horse-stealers of their clergy, is worded in such a manner as makes it doubtful whether it extend to those who steal but one, which occasioned the making of 2. (a) and 3. Edw. 6. c. 33. which declares, "That a person feloniously stealing one horse, gelding or mare, shall be put from his clergy, in the same manner as if he had been indicted or appealed for stealing of two, &c."

(a) Vide infra
§ 61.

Sect. 40. FIFTHLY, In that the clause which ousts house-breakers of their clergy, is not worded in such a manner as fully brings their offence under the notion of felony; for it is thus expressed, "Any person who shall be attainted, &c. of breaking any house by day or night, any person being therein and put in fear or dread, &c." But such a breaking even in the night is no felony, unless it be done with an intent to commit a felony, which makes it burglary; neither can it be felony, if done in the day with any intent whatsoever; for though a felony follow, which may make the house-breaking done with an intent to commit it, properly enough to be called felonious; yet it seems, that it cannot make it become (b) a felony, because it is not reducible to any species of felony. And therefore the statute must be supplied by a reasonable intendment, and (c) construed to mean such house-breaking only as amounts to, or is attended with felony.

(b) Yet quære, for this matter is doubtfully expressed.

S. P. C. 126.

11. Coke 31, 32. (c) S. P. C. 125, 126. 11. Coke 31, 32.

(d) 11. Coke 31.

(e) Moor 436.

9. Inst. 111.

(f) B. 1. c. 37.

1. c. 6, 7.

2. Hale 370.

Sect. 41. It is holden by *Sir Edward Coke*, (d) that piracy was restored to the benefit of clergy by this statute; but as to piracy on the high sea, the contrary hath been solemnly (e) adjudged and confirmed by constant experience, and is certainly agreeable to the (f) legal notion of piracy in other cases; which being a capital offence by the civil law only (even after the statute of 28. Hen. 8. c. 15. which altered not the nature of the offence, but only the manner of the trial), shall not be included in a statute speaking generally of felonies, which shall be construed only of those felonies which are such by our law; as those piracies are (g) which are committed in a creek or port within the body of a county, but no other.

(g) Bk. 1. c.

37. sect. 11.

2. Hale 369.

Sect. 42. The next general statute relating to these matters is 5. & 6. Edw. 6. c. 10. which first recites the above-mentioned (b) clause of 23. Hen. 8. concerning clergy, and takes notice that it was defective in omitting those who rob, &c. in one county, and remove the thing taken into

(b) Vide sup.
§ 309

into another, and there tried, &c. and that this omission was supplied by 25. Hen. 8. and that the said statute of 25. Hen. 8. was in this respect made ineffectual by 1. Edw. 6. c. 12. which restored clergy as it stood before the reign of Hen. 8. to all the felonies not therein mentioned; and that by reason of the said statute of 1. Edw. 6. divers persons had committed robberies, &c. in one county and after had been taken, &c. and tried in another, and there had their clergy, which they would not have had, if the said statute of 25. Hen. 8. had stood in force; and there goes on in these words, "For redress whereof from henceforth to be had, be it enacted, &c. that the said act made in the said 25th year, touching the putting of such offenders from their clergy; and every article, clause and sentence contained in the same, touching clergy, shall from henceforth, touching such offence from henceforth to be committed and done, stand, remain, and be in full strength and virtue, in such manner and form, as it did before the making of the said act in the first year of the reign of our sovereign lord the king that now is; any clause, article, or sentence comprised therein to the contrary notwithstanding."

2. Hale 341.

SECT. 43. It was for some time a great question, Whether this statute revived 25. Hen. 8. for the whole, or only for such part of it which relates to felons removing the thing feloniously taken into a different county from that wherein they took it, and there tried, &c. And *Sir William Staunford* (a) inclines to the latter opinion; because the words (a) *S. P. C.* are, "that the said act made in the said twenty-fifth year, touching the putting such offenders from their clergy, shall be revived, &c." where the word "*such*" shall have relation only to the offenders mentioned before; which are those who steal in one county, and remove the thing stolen into another. And this objection is strengthened (b) by the title of the act, which is only this, "That (b) *11. Coke* such as rob in one shire, and fly into another, shall not have their clergy." To which it may be added, that all statutes which take away clergy, are to be construed strictly *in favorem vite*.

33.

Yet it hath been adjudged, (c) and is, as I take it, fully (d) settled, that this statute revived 25. Hen. 8. as to every other part of it, as well as that concerning felons carrying the things stolen from one county into another. For granting that the makers of the statute of 5. & 6. Edw. 6. had the case of such felons principally in their view; which appears pretty plainly, not only from the title of the statute, but also from the preamble and purview; for

(c) *11. Coke*

33, 34, 35.

(d) *Sum. 232.*

2. Hale 341.

See *Rastal's*

statutes, title

Clergy, *par.*

16.

the preamble expressly takes notice of no other mischief from the repeal of 25. Hen. 8. but only this, "that there- by many of such felons had their clergy;" and then follows the enacting clause, which begins in these words, "For redress whereof," and then goes on, "be it enacted, &c. that 25. Hen. 8. touching such offenders and such offences, remain in full force." Yet considering that the statute of 5. & 6. Edw. 6. begins with a recital of the whole clause of 23. Hen. 8. wherein there are several other offences contained, and that the words, "such offenders" and "such offences" in the enacting clause of 5. and 6. Edw. 6. may properly enough refer to them, as well as to the offence of the felons mentioned next immediately before; and farther considering that the words, "*such offenders and such offences*," may properly enough be taken to include all *such in mischief*, and *such in inconvenience*, according to the received (a) construction of the word "*such*" in some other statutes, and *a fortiori* those in greater mischief and greater inconvenience, as almost all the other offences specified in 25. Hen. 8. are, as for instance, petit treason, murder, arson, &c.; and that it is a received (b) construction of penal statutes, to extend them to all cases that come within the meaning of the words; and that it would be absurd to imagine that the makers of the statute intended to put those who carried goods stolen into a different county, in a worse case in such county than in that wherein they stole them, as they must be, if 25. Hen. 8. were only revived against them where they carried the thing stolen into a different county, for by such a construction they would have been excluded from clergy, in the county wherein they committed the robbery, by 1. Edw. 6. c. 12. only, which not extending to those who challenge above the number of twenty, might easily be evaded, whereas in a different county they would be excluded from it in such case by 25. Hen. 8.; to which may be added, (c) that the first sentence of the purview of 5. & 6. Edw. 6. viz. "that the said act of 25. Hen. 8. touching the putting such offenders from their clergy," had been sufficient, if no more had been intended but the excluding those who rob in one county and fly into another, and therefore it is most natural to intend that it was the meaning of the makers of the statute, by adding those farther words, "that every article, clause and sentence in the same, touching clergy, shall, touching *such offences*, remain, &c." to revive the whole statute so far as it related to clergy; and since the whole statute of 25. Hen. 8. is revived, it follows by a necessary consequence, that so much of 23. Hen. 8. also as is expressly affirmed by it, is revived also.

(a) 11. Coke
33.

(b) 11. Coke
33, 34.
Vide sup. sect.
25. and Book
the first, chap.
33. sect. 3.

(c) 11. Coke 34.

Sec. 44. And therefore since 25. Hen. 8. having recited the clause of 23. Hen. 8. concerning clergy, and the mischief that it extended only to those who are found guilty, expressly enacts, " That whoever shall be indicted of " petit treason, wilful burning of houses, murder, robbery " or burglary, or other felony, according to the tenor and " meaning of the said statute, and stand mute, or challenge " peremptorily above twenty, &c. shall lose the benefit of " the clergy, in like manner as if he had pleaded, and been " found guilty ;" whereby it affirms and enforces the 23. Hen. 8. as to those found guilty of such crimes ; it follows by a necessary consequence, that persons not in holy orders found guilty of petit treason, or (a) arson, (a) 11. Coke 34. 35. Summary 232, 233. 1. Hale 570, 571, &c. S. P. C. 115, 2. Hale 345, 346. Con. Savil 46.

Sec. 45. But it is observable, that the said statute of 25. Hen. 8. wholly omits (b) accessaries, as well as 1. Edw. 6. But to remedy this defect, it is enacted by 4. & 5. Ph. & Mary, c. 4. " That every person that shall maliciously com- " mand, hire, or counsel any person or persons, to com- " mit or do any petit treason, wilful murder, or to do any " robbery in any dwelling-house or houses, or to commit " or do any robbery in or near the highway in the realm " of England, or in any other the queen's dominions, or " to commit or do any robbery in any place within the " marches of England against Scotland, or wilfully to " burn any dwelling-house, or any part thereof, or any " barn then having corn or grain in the same ; that then " every such offender, being outlawed thereof, or being " thereof arraigned and found guilty by the order of the " law, or being otherwise lawfully attainted or convicted " of the same offence, or being arraigned thereof, do stand " mute of malice or froward mind, or do challenge peremp- " torily above the number of twenty persons, or will not " answer directly to such offence, shall not have the bene- " fit of his clergy." (b) Vide sup. sect. 33.

It is observable,

Sec. 46. FIRST, That this statute is general as to all robberies in any dwelling-house, yet it seems to have been always taken as a (c) reasonable construction, that it shall be restrained to such robberies of this kind as were excluded from the benefit of clergy by some former statute; for it cannot be well imagined that the makers of this or any statute in- (c) 11. Coke 35, 36. 27. Summary 235. 2. Hale 342. Con. Savil 46.

tended in any case to take away clergy from the accessory, where the principal is left to the full benefit of it.

Sect. 47. SECONDLY, That an indictment or appeal, in order to oust an accessory of his clergy by force of this statute, must expressly pursue it, in substance (a) at least, as hath been already shewn, section twenty-five.

(a) Vide Dyer 386. that the words wilful murder, in an indictment on the statute, are sufficiently pursued by laying the murder done *ex malitia præcogitata*.

Sect. 48. It is further enacted by 3. & 4. Will. and Mary, c. 9. s. 3. "That if any person or persons what-soever be indicted of any offence, for which by virtue of any former statute he or they are excluded from having the benefit of his or their clergy, if he or they had been thereof convicted by verdict or confession, if he or they stand mute, or will not answer directly to the felony, or shall challenge peremptorily above the number of twenty persons returned to be on the jury, or shall be outlawed thereupon, shall not be admitted to the benefit of his or their clergy."

Sect. 49. BUT NOTE, That this statute extends not to appeals, nor to offences made felonies by subsequent statutes.

AND now I am in the second place more distinctly to consider the several statutes which take away the benefit of clergy, so far as they particularly relate to the several kinds of crimes.

For the better illustration whereof, having referred the reader, as to the felonies made such by statute, to the several chapters in the first book wherein such felonies are handled, I shall here consider the statutes which take away clergy from capital offences at the common law, under the following heads—as they relate,

1. To petit treason.
2. To homicide.
3. To larceny.
4. To sacrilege.
5. To robbery.
6. To burglary.
7. To arson.

I. AS TO PETIT TREASON.

Seft. 50. It is certain, that by force of 23. & 25. Hen. 8. revived (a) by 5. & 6. Edw. 6. the principal not being a (b) clerk in holy orders, is excluded from the benefit of clergy, upon a (c) conviction, (d) standing mute, or challenge of more than twenty upon an (e) indictment, (a) Sup. f. 439.
44.
Summary
232.
2. Hale 341.
(b) Sup. feft.
(c) Sup. feft.
(d) Sup. feft.
(e) Sup. feft.

13. (c) Sup. feftion 30. (d) Sup. feftion 32, 33. (e) Sup. feftion 33.

Seft. 51. And *Sir Matthew Hale* (f) seems to be of opinion, that the principal is likewise ousted of his clergy by 23. Hen. 8. in appeal of petit treason, if he be convicted by verdict or confession, but not in other cases. (f) 2. Hale
338, 339. 341.
Summary 232.

But *quære*, How this can be? For since so much (g) only of 23. Hen. 8. seems to be revived, as affirmed and enforced by 25. Hen. 8. and that no way extends to appeals but only to indictments, it seems difficult to make out, that any part of 23. Hen. 8. so far as relates to appeals, is revived by 25. Hen. 8. (g) Sup. feft.
43, 44.

Seft. 52. But I would rather incline to think, that the principal in an appeal of petit treason may be excluded from his clergy by (h) 1. Edw. 6. c. 12. in all cases except that of challenging above the number of twenty, under the words "murder of malice prepensed," in that statute; because all petit treason, in the very notion of it, necessarily (i) includes such murder and more. (b) Sup. f. 34.
35.
(i) Bk. 1. c. 32.
1. 6.
2. Hale 340.

Seft. 53. However, the makers of 4. (k) and 5. Ph. and Mary, c. 4. seem plainly to have been of opinion, that the principals in petit treason are excluded from clergy in all cases, as well upon an appeal as indictment; because they have in all cases expressly excluded the accessaries maliciously before, as well upon an appeal as indictment; and (l) it cannot be well imagined that they intended to make the law more severe against them than against the principals. (k) Vide supra
feftion 45.
(l) Vide 11. Co.
35.
2. Hale 342.
346. and sup.
feft. 46.

II. AS TO HOMICIDE.

Seft. 54. It is certain, that wilful murder of *malice prepensed* is excluded from the benefit of clergy upon indictments (m) Ante, in all cases by 23. & 25. Hen. 8. and 1. Edw. 6. c. 12. before recited (m). page 257, 258.

(*) Sum. 232.
a. Hale 343.

Sect. 55. Also it seems (a) to be the opinion of *Sir Matthew Hale*, that it likewise is excluded from clergy in all cases as well upon appeals as indictments. But this seems questionable; for appeals are certainly not (b) within 25. Hen. 8. and therefore since so much only of 23. Hen. 8. is revived by 5. and 6. Edw. 6. as is affirmed and enforced by 25. Hen. 8. I do not see how it can be revived as to any appeal. From whence it seems to follow, that the only statute which expressly excludes them is 1. Edw. 6. c. 12. which (c) omits the case of challenging more than twenty. Neither is this defect supplied by 3. & 4. Will. and Mary, c. 9. for this extends (d) only to indictments.

(b) Vide sup.
L. 42, 43. 51.

(c) Vide sup.
sect. 34. 36.

(d) Sup. sect.
48, 49.

Sect. 56. But accessaries maliciously before to such murder are expressly excluded from clergy in all cases, as well upon appeals as indictments, by 4. & 5. Ph. and Mary, c. 4. and how far the principal may (e) hereby in like manner be implicitly excluded also in all cases, I shall leave to be considered.

(e) 11. Coke
35. and sup.
sect. 46. 51.
Vide 2. Hale
342. 344.
as to accessaries after the fact in petty treason and murder,

2^d Bk. 1. ch.
50. f. 4 to 7.

Sect. 57. By 1. Jac. 1. c. 8. "He that shall be convicted by verdict of twelve men, or confession, or otherwise according to the laws of this realm, of homicide, by stabbing," but not those who abet them, &c. (for which I shall refer to book the first, chapter 30. sect. 4, 5, &c.) "shall be excluded from the benefit of his clergy, &c."

Sect. 58. And this statute seems plainly to extend as well to appeals as indictments, but not to the case of standing mute, or challenging above twenty, &c. But those who are indicted of such manslaughter are excluded from clergy in all such cases, as well as on a conviction, by 3. & 4. Will. and Mary, c. 9.

III. LARCENY is excluded from the benefit of clergy in Sup. sect. 48, the following cases;

49.

1. In that of a felonious secret taking from the person,
2. In that of horse-stealing.
3. In that of stealing from a shop or dwelling-house, &c.

4. In

4. In that of stealing woollen manufactures from the tenters, or linen from the place of manufacture.

5. In that of stealing the king's naval stores.

6. In that of stealing sheep and other cattle.

7. In that of thefts on navigable rivers above the value of forty shillings.

8. In that of stealing from vessels in distress, or that have suffered shipwreck.

AND FIRST, As to a felonious secret taking from the person.

Sec. 59. It is enacted by 8. Eliz. c. 4. "That no person who shall be indicted or appealed for felonious taking of any money, goods, or chattels, from the person of any other, *privily without his knowledge*, in any place whatsoever, and thereupon found guilty by verdict of twelve men, or shall confess the same upon his or their arraignment, or will not answer directly to the same, according to the laws of the realm, or shall stand wilfully or of malice, or obstinately mute, or challenge peremptorily above the number of twenty, or shall be upon such indictment or appeal outlawed, shall be admitted to his clergy, &c."

See the first vol. "Larceny from the Person," for the construction of this statute.

Sec. 60. BUT NOTE, That this statute extends not to any accessaries before or after.

Vide sect. 26.
45, 46.
1. Hale 529.
Foster 356.

SECONDLY, As to horse-stealers.

Sec. 61. It seems, that they are (a) ousted of their clergy in all cases, as well upon appeals as indictments, by 1. Edw. 6. c. 12. and 2. & 3. Edw. 6. c. 33. by the latter of which statutes it is enacted, "That all persons feloniously taking or stealing any horse, gelding, or mare, shall not be admitted to the privilege of the clergy, but shall be put from the same, in like manner and form as though they had been indicted or appealed for felonious stealing of two horses, two geldings, or two mares of any other, and thereupon found guilty by verdict of twelve men, or confessed the same upon their arraignment, or stand wilfully or of malice mute."

(a) Vide sect. 34, 39.
2. Hale 364, 365.

Sec. 62. It seems a reasonable (b) construction of this statute to extend it as well to those who are outlawed, or

(b) S. P. C. 123.
Summary 238.
chal. 2. Hale 365.

challenge more than twenty, as to those who are found guilty by verdict, &c. because it is general, that all such persons "shall be put from their clergy, &c. in such manner as if they had been found guilty, &c." and if they had been found guilty, it is certain that they would have been ousted of their clergy by the express words of 1. Edw. 6. c. 12. s. 10.

Supra 34, &c.

+ Sect. 63. It is enacted by 31. Eliz. c. 12. s. 5. (which prescribes the manner in which horses shall be publicly bought and sold), "That not only all accessaries before the fact, but also all accessaries after the fact in horse-stealing shall be deprived and put from all benefit of their clergy, as the principal, by statute heretofore made, is, or ought to be."

THIRDLY, As to larceny from a dwelling-house, shop, &c.

Barrington
upon the Sta-
tutes 477.

Sect. 64. It is enacted by 10. & 11. Will. 3. c. 23. "That all persons who by night or day shall in any shop, warehouse, coach-house, or stable, privately and feloniously steal any goods, wares, or merchandizes, of the value of 5s. or more, though such shop, &c. be not broke open, and though the owner or any other person be not in such shop, &c. or that shall assist, hire or command any person to commit such offence, being thereof convicted, or attainted by verdict or confession, or being indicted thereof shall stand mute, or challenge above twenty of the jury, shall be excluded from the benefit of the clergy."

(a) Vide sect.
26, 27, 28.
(b) Vide sect.
26, 45, 46.
(c) Vide sect.
48, 49.

Sect. 65. But this statute seems defective in neither mentioning persons (a) outlawed, nor (b) accessaries; neither is it helped by 3. & 4. Will. & Mary, c. 9, because (c) it is subsequent to it.

Sect. 66. By 12. Ann. c. 7. "Every person who shall feloniously steal any money, goods or chattels, wares or merchandizes, of the value of 40s. or more, being in a dwelling-house, or out-house thereunto belonging, although such house or out-house be not actually broken by such offender, and although the owner of such goods, or any other person or persons be or be not in such house or out-house, or shall assist, or aid any person or persons, to commit any such offence, being thereof convicted or attainted by verdict or confession, or being indicted thereof shall stand mute, or will not directly answer to the indictment, or shall peremptorily challenge
"above

“ above the number of twenty returned to be of the jury,
 “ shall be absolutely debarred of and from the benefit of
 “ clergy, &c.”

Sec. 67. But it is provided, “ That nothing in this act
 “ shall extend to apprentices under the age of fifteen years
 “ who shall rob their masters as aforesaid.”

Sec. 68. This statute seems also defective, like the former, as to persons outlawed, and accessaries. *Vide* *sect.* 26,
27, 28. 64, 65.

FOURTHLY, As to those who shall feloniously steal wool-
 len manufactures from the tenters.

Sec. 69. It is enacted by 22. Car. 2. c. 5. “ That no
 “ person who shall be indicted for feloniously cutting and
 “ taking, stealing or carrying away of any cloth or wool-
 “ len manufactures from the rack or tenter in the night-
 “ time, and thereupon found guilty by verdict of twelve men,
 “ or shall confess the same on arraignment, or will not an-
 “ swer directly to the same, according to the laws of the realm,
 “ or shall stand wilfully of malice mate, or challenge pe-
 “ remptorily above the number of twenty, or shall be upon
 “ such indictment outlawed, shall be admitted to the bene-
 “ fit of clergy, &c.”

† It is also enacted by 18. Geo. 2. c. 27. “ That Stealing from-
bleaching-
yards or print-
ing grounds.
 “ all and every person and persons who shall by day or
 “ night feloniously steal any linen, fustian, callico, cot-
 “ ton, cloth, or cloth worked, woven or made of any cot-
 “ ton or linen yarn mixed, or any thread, linen, or cotton
 “ yarn, linen or cotton tape, inkle, filleting, laces, or any
 “ other linen, fustian, or cotton goods, or ware whatsoever,
 “ laid, placed, or exposed to be printed, whitened, bowked,
 “ bleached, or dried in any whitening or bleaching croft,
 “ lands, fields or grounds, bowking-house, drying-house,
 “ printing-house, or other building, ground, or place
 “ made use of by any callico printer, whittier, crofter,
 “ bowker or bleacher, for printing, whitening, bowking,
 “ bleaching, or drying of the same, to the value of
 “ ten shillings; or who shall aid or assist, or shall wil-
 “ fully or maliciously hire or procure any other person or
 “ persons to commit any such offence, or who shall buy
 “ or receive any such goods or wares so stolen, knowing
 “ the same to be stolen as aforesaid, shall, on conviction,
 “ be deemed guilty of felony, and suffer death without
 “ benefit of clergy.”

† But

† But it is also provided by the said statute, p. 2. " That in case the judge or court, by and before whom any such offender shall be tried and convicted, shall think it reasonable, he may, instead of giving judgment of death, order such offender or offenders to be transported for the space of fourteen years."

FIFTHLY, As to those who steal naval stores.

N. B. This statute extends neither to appeals nor to accessaries.

SECT. 70. It is observable, That those who " shall steal or embezzle any of his majesty's sails, cordage, or any other his majesty's naval stores, to the value of twenty shillings," are in the like manner excluded from clergy by 22. Car. 2. c. 5. as those who steal woollen manufactures from the tenters, &c.

For the offence of having the custody of the king's naval stores, vide Book the first.

† SECT. 71. But it is provided by the said statute, par. 4. " That it shall and may be lawful for the judges or justices of the court before whom such offender shall be arraigned and condemned, to grant a reprieve for the staying execution, and to cause such offender to be transported for the space of seven years."

† SIXTHLY, As to stealing SHEEP AND OTHER CATTLE.

Vide Book 1. title " Larceny."

It is enacted by 14. Geo. 2. c. 6. " That if any person or persons shall feloniously drive away, or in any other manner feloniously steal one or more sheep, or other cattle of any other person or persons whatsoever, or shall wilfully kill one or more sheep, or other cattle of any other person or persons whatsoever, with a felonious intent to steal the whole carcase or carcasses, or any part or parts of the carcase or carcasses of any one or more sheep, or other cattle that shall be so killed, or shall assist or aid any person or persons to commit any such offence or offences, they shall be adjudged guilty of felony, and suffer death without benefit of clergy."—But it is enacted by 15. Geo. 2. c. 34. " That this act was meant and intended, and shall be construed, deemed, and taken to extend to any bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever."

SEVENTHLY, As to thefts ON NAVIGABLE RIVERS.

It is enacted by 24. Geo. 2. c. 45. " That all and every person and persons that shall feloniously steal any goods, wares, or merchandize of the value of forty shillings in any ship, barge, lighter, boat, or other vessel or craft upon

" upon any navigable river, or in any port of entry or discharge, or in any creek belonging to any navigable river, port of entry or discharge within the kingdom of Great Britain, or shall feloniously steal any goods, wares, or merchandize of the value of forty shillings upon any wharf or key adjacent to any navigable river, port of entry or discharge, or shall be present, aiding and assisting in the committing any of the offences aforesaid, being thereof convicted or attainted; or being indicted thereof, shall of malice stand mute, or will not directly answer to the indictment, or shall peremptorily challenge above the number of twenty persons returned to be of the jury, shall be excluded from the benefit of clergy."

† EIGHTHLY, As to stealing from VESSELS IN DISTRESS, or plundering goods that have been saved from the wreck;

The benefit of clergy is taken away by 12. Ann. stat. 2. ch. 18. and 26. Geo. 2. c. 19. the particulars of which are fully set forth Book the first, and to which I refer.

IV. AS TO SACRILEGE;

Stat. 72. It is observable, That all persons not in holy orders who shall be indicted, whether in the same county wherein the fact was committed, or in a (a) different county, of " robbing any church, chapel, or other holy place," are excluded from their clergy by (b) 23. Hen. 8. c. 1. and 25. (c) Hen. 8. c. 3. revived (d) by 5. & 6. Edw. 6. c. 10. upon a conviction, standing mute, or peremptory challenge of more than twenty; and by 3. & (e) 4. Will. and Mary, c. 9. upon an outlawry.

(a) *Infra* 80.
81, 82.
(b) *Vide sup.*
sect. 30, 31.
2. Hale 365.
(c) *Vide sup.*
sect. 32, 33.
(d) *Vide sup.*
f. 43, 44.
(e) *Vide supra*, section 48, 49.

Stat. 73. But the word " robbing" (f) being always taken to carry with it some force, as shall be more fully shewn, sections 88. 92. 96. it seems, that no sacrilege is within any of these statutes, which is not accompanied with the actual breaking of a church, &c.

(f) *Kely* 58.
69.
Dyer 224.

Stat. 74. But by 1. Edw. 6. c. 12. (g) f. 10. all persons in general are ousted of their clergy for the " felonious taking of any goods out of any parish church, or other church or chapel," in all cases, except that of challenging more than twenty; and by 3. and (h) 4. Will.

(g) *Vide sup.*
sect. 34, 35,
36.
(h) *Vide sup.*
sect. 48, 49.

and

and Mary, c. 9. upon such a challenging as well as upon a conviction, &c. upon an indictment (a) whether in the same county wherein the sacrilege was committed, or in a different one.

(a) Infra 80.
2. Hale 365, 366.

sect. 75. But it seems, that accessaries to such a robbery or felonious taking are excluded from their clergy by no statute; for though they are expressly mentioned by 23. Hen. 8. c. 1. yet since they are omitted by 25. Hen. 8. c. 3. and so much only (b) of 23. Hen. 8. c. 1. is revived as is affirmed and enforced by 25. Hen. 8. c. 3. they seem to remain in the same case as if they had been wholly omitted by 23. Hen. 8. c. 1. which is the only statute I know of which extends to them; except the offence amount to burglary; in which case accessaries before are ousted of their clergy by 3. & 4. Will. & Mary, c. 9.

(b) Vide sup.
sect. 43, 44.
82-55.

sect. 76. But *quære* if there be need of any statute to exclude them, since the common law seems to have given no person whatsoever any right to demand the privilege of the clergy for sacrilege, but only at the discretion of the ordinary, as hath been more fully shewn, section the ninth.

2. Hale 333.

V. As to ROBBERY, I shall particularly consider the statutes excluding it from clergy, as they relate,

1. To robbery in or near the highway.
2. To robbery in a dwelling-house, booth or tent.
3. To robbery in general.

AND FIRST, As to robbery in or near the highway.

sect. 77. It is observable, that all persons, not in holy orders, who shall be indicted (c) of "robbing any person or persons in or near the highways," are excluded from the clergy by 23. (d) Hen. 8. c. 1. and 25. (e) Hen. 8. c. 3. revived (f) by 5. and 6. Edw. 6. c. 10. upon a conviction, standing mute, or peremptory challenge of more than twenty; and by 3. & 4. (g) Will. & Mary, c. 9. upon an outlawry.

(c) Vide sup.
sect. 30.

(d) Vide sup.
sect. 30, 31.

(e) I. 32, 33.

(f) 42, 43, 44.

(g) Sect. 48,

49.

sect. 78. AND NOTE, That all persons in general, "who shall be guilty of robbing any person or persons in the highway, or near to the highway," are excluded from the clergy both upon an appeal and indictment by (b) 1. Edw. 6. c. 12. s. 10. in all cases except that of challenging more than

(b) Vide sup.
sect. 34, 35,
36, 37.

than twenty; and by 3. & 4. Will. & Mary, c. 9. upon such a challenge upon an indictment.

SECT. 79. NOTE, That no robbery is within these statutes, but such as is laid in the indictment to have been committed in or near the (a) highway, and to have (b) put the person robbed in fear. (a) Vide f. 25. (b) Sect. 73. Dyer 224. And Bk. 1. c. 35. f. 13.

SECT. 80. By 25. Hen. 8. c. 3. revived (c) by 5. and 6. Edw. c. 10. it is recited, "That divers felons and robbers that had committed many heinous robberies and burglaries in one shire, and conveyed the spoil and robbery into another shire, and had been there (d) taken, indicted and arraigned upon felony, and felonious taking of the same goods, and not upon the same robbery nor burglary, for that it was not committed nor done in the same shire where they had been so indicted and arraigned, and by reason thereof the same felons, robbers, and burglars had enjoyed the privilege of their clergy:" And thereupon it is enacted, "That if any person or persons be indicted of felony for stealing of any goods or chattels, in any county within this realm of England, and be thereupon arraigned and found guilty, or stand mute of malice, or challenge peremptorily above the number of twenty persons, or will not directly answer to the law, shall lose and be put from the benefit of the clergy, in like manner and form as they should have been if they had been indicted and arraigned, and found guilty in the same county where the said robbery or burglary was done or committed; if it shall appear to the justices before whom any such felons or robbers be arraigned by evidence given before them, or by examination, that the same felonies whereupon they were so arraigned, had been such robberies or burglaries, in the same shire wherein such robberies or burglaries were committed or done, by reason whereof they should have lost the benefit of their clergy by force of 23. Hen. 8. in case they had been found guilty thereof in the same shire where such robberies or burglaries were so committed and done." (c) Vide supra f. 43, 44. (d) Vide Bk. 1. c. 33. f. 9.

SECT. 81. BUT NOTE, That this statute extends (e) not to those who are outlawed; nor to those who are indicted out of the realm of England; nor to those who are indicted of such stealing as is excluded from clergy by subsequent statutes; nor to appellees; but the three first of these defects are supplied by 3. and 4. Will. and Mary, c. 9. by which it is enacted, "That if any person or persons be indicted of felony for stealing of any goods or chattels, in any county within this realm of England, dominion VOL. IV. T " of (e) 11. Co. 31. 1. Hale 548. 2. Hale 349.

“ of *Wales*, or town of *Berwick-upon-Tweed*, and there-
 “ of be convicted or attainted, or upon his or their ar-
 “ raignment shall stand mute, or will not directly an-
 “ swer to the indictment, or shall challenge peremptorily
 “ above the number of twenty persons returned to be of
 “ the jury, he or they shall be totally excluded from having
 “ the benefit of his or their clergy, if it appear upon evi-
 “ dence or examination before the justices, that the said
 “ goods or chattels were taken by robbery or burglary, or
 “ in any other manner, in any other county, whereof if
 “ such person or persons had been convicted by a jury
 “ of the said other county, he or they are excluded by virtue
 “ of this or any other act from having the benefit of his or
 “ their clergy.”

(a) 11. Coke
31.

SecT. 82. NOTE, That (a) the words, “ If it shall ap-
 “ pear upon evidence before the justices, &c.” are to be in-
 “ tended where the party pleads not guilty, and is found guilty
 “ by the jury; and the words “ If it shall appear upon exa-
 “ mination, &c.” are to be intended where he stands mute, or
 “ challenges peremptorily above the number of twenty, or is
 “ outlawed, or confesses (b) &c.

(b) Vide sup.
f. 29. 31.
11. Coke 31.
Con. 1. And.
114.

(c) And. 114.
1. Hale 518.

And it hath been (c) adjudged, that there is no need to
 make any entry on the record, that it appears by such
 evidence, or examination, that the felony was originally
 commenced in a different county, and was of such a nature
 that the offender could not have his clergy. But it is said,

(d) Sum. old
edition 1678.

(d) that it is usual to write in the margin of the indict-
 ment, that it is for robbery, &c. in another county.

(e) Moor 550.
Summary 241.
1. Hale 536.
2. Hale 349.

SecT. 83. It is said to (e) have been holden by all the
 justices, that if the felony, whereof a man is found guilty
 in the county wherein he is indicted, be such as doth
 not need the benefit of clergy, as amounting only to pe-
 tit larceny, &c. the offender shall have only the proper
 judgment for such offence, and no other, in respect of
 the robbery, &c. proved upon the evidence, &c. in the
 first county; for being convicted of no offence which will
 warrant a judgment of death, and consequently having no
 need to demand his clergy, he cannot be hurt by being ex-
 cluded from it.

(f) Vide sup.
f. 45, 46.
How such of-
fence must be
laid in the in-
ment, vide sup. f. 25.

SecT. 84. By 3. and 4. (f) Philip and Mary, c. 4.
 “ Those who shall maliciously command, hire, or
 “ counsel any person or persons to commit or do any rob-
 “ bery in or near any highway in this realm of *England*.

"or in any other the Queen's dominions, shall be ousted of their clergy, on a conviction, standing mute, peremptory challenge of more than twenty, or outlawry."

SECONDLY, AS TO ROBBERY IN A DWELLING-HOUSE, BOOTH, OR TENT, I shall consider the statutes concerning it as they relate,

1. To such robbery putting some person in fear.

2. To such robbery putting no person in fear.

FIRST, As to such robbery putting some person in fear.

SECT. 85. It is observable, that all persons not in holy orders, "who shall rob any person or persons in their dwelling-houses, or dwelling-place, the owner or dweller in the same house, his wife, his children, or servants then being within, and put in fear and dread by the same, and indicted," (a) are excluded from their clergy by 23. Hen. 8. c. 1. and 25. Hen. 8. c. 3. revived by 5. and 6. Edw. 6. c. 10. upon a conviction, standing mute, or peremptory challenge of more than twenty, and by 3. and 4. Will. and Mary, c. 9. upon an outlawry. 2. Hale 352, 352, &c.
(a) Vide sup. sect. 30, 31, 32, 33, 42, 43, 44, 48, 49, 72, 77.

SECT. 86. AND NOTE, (b) That by 25. Hen. 8. c. 3. and 3. and 4. Will. and Mary. c. 9. they are excluded from their clergy on an indictment in a foreign county. And their accessories before are excluded in all cases by 3. and 4. Philip and Mary, c. 4. (b) Vide sup. sect. 80, 81, 82, 83.
(c) Vide sup. sect. 45, 46.

SECT. 87. By 1. (d) Edw. 6. c. 12. f. 10. all persons in general who shall break any house by day or by night, viz. "who shall break a house burglarly, (e) if in the night, or shall break a house or commit a felony therein, if in the day, (f) any person being then in the same house where the same breaking shall be, and there by put in fear or dread," are excluded from their clergy, as well upon an appeal as an indictment, in all cases, (g) except that of challenging more than twenty; and by 3. (b) & 4. Will. and M. c. 9. upon such a challenge, as well as upon a conviction, &c. upon an indictment, whether in the same county wherein the breaking and felony was committed, or in a (i) different county; and the accessories before to such a breaking, if accompanied with stealing in a dwelling-house, are ousted of their clergy in (d) Vide sup. sect. 44, &c.
(e) Vide sup. sect. 40.
11. Coke 36.
(f) Vide infra sect. 93.
(g) Vide sup. sect. 36.
(h) Vide sup. sect. 48, 49.
(i) Vide sup. sect. 82, 83.

(a) Sum. 236. all (a) cases by 4. and 5. Philip and Mary, c. 4. because the felonious taking being accompanied with a breaking, seems properly (b) enough to come under the notion of robbery in a dwelling-house, all accessaries to which before the fact are expressly excluded from their clergy by that statute, as accessaries before to robbery in general are by 3. and (c) 4. Will. and Mary, c. 9.

(d) Kelynge 58, 59. 70. Sup. f. 73. 87. infra f. 92. 96. Vide Foster 108, 109.

Self. 88. But (d) no breaking is within the statute of 1. Edw. 6. which doth not amount to an actual breaking of an house, or of some part of it; as of a cupboard or door, &c. fixed to the freehold; and therefore the breaking of a trunk or box, &c. seem plainly not to be within the statute.

But by 3. and 4. Will. and Mary, c. 9. "Every person or persons that shall feloniously take away any goods or chattels, being in any dwelling-house, the owner, or any other person being therein, and put in fear, or shall comfort, aid, abet, assist, counsel, hire, or command any person to commit such offence, being thereof convicted, or attainted, or indicted, and standing mute, or peremptorily challenging above twenty, shall be ousted of the benefit of their clergy."

2. Hale 354, 355, &c.

SECONDLY, As to such robbery, putting no person in fear: I shall consider the statutes concerning it as they relate,

1. To such robbery in a house which some person is in at the time;
2. To such robbery in a house which no person is in at the time.

As to the first of these, viz. In what cases persons are ousted of their clergy for robbery in a house which some person is in at the time.

Self. 89. By 5. and 6. Edw. 6. c. 9. it is enacted, "That if it happen any person or persons to be found guilty according to the laws of this realm, for robbing of any person or persons in any part or parcel of their dwelling-houses, or dwelling-places, the owner or dweller in the same house, or his wife, his children, or servants being then within the same house, or place where it shall happen the same robbery and felony shall be committed and done, or in any other place within the precinct of the same house or dwelling-place, that such offenders shall in no wise be admitted to their clergy, whe-

"then

“ther the owner or dweller in the same house, his wife,
“or children then and there being, shall be waking or
“sleeping.”

Sec. 90. “And by 5. & 6. Edw. 6. c. 9. it is fur-
ther enacted, That no person or persons which shall hap-
“pen to be found guilty after the laws of this realm,
“of and for robbing any person or persons, in any booth
“or tent in any fair or market, the owner, his wife, his
“children, or servants or servant then being within the
“booth or tent, shall be admitted to the benefit of his
“or their clergy, but utterly be excluded thereof, &c. with-
“out having any respect or consideration whether the
“owner or dweller in such booths and tents, his wife,
“children, or servants being in the same booths or tents at
“the time of such robberies and felonies committed, shall
“be sleeping or waking.”

Sec. 91. This statute (a) seems plainly to extend to all
who shall be convicted by verdict or confession, whether up-
on an appeal or indictment, but not to those who shall be
outlawed, or stand mute, or challenge peremptorily above
twenty jurors; but these defects are supplied as to indict-
ments by 3. (b) and 4. Will. & Mary, c. 9.

(a) Sum. 236.

237.

2. Hale 355.

(b) Vide sect.

48, 49.

Sec. 92. It seems to be generally agreed, that no robbery
is within this statute which is not accompanied with an
actual (c) breaking of an house, or of some part of it.

(c) For this,

vide sup. l. 73.

87, 88. 96.

Summary 237, 238. 2. Hale 354. Yet in Popham 84. there is a case seemingly
contrary.

Sec. 93. Also it seems to be agreed, (d) that a sojour-
ner's being in a house at the time of the robbery doth not
bring it within this statute; for the words are, “The
“owner or dweller in the same house, or his wife, his
“children, or servants, being then within the same house,
“&c.” Yet it is said in (e) *Hale's Pleas of the Crown* to
have been ruled by advice of the justices, that where one
entered into the lodging of *Sir H. Hungate*, being parcel of
Whitehall, and broke open a chamber and took away his
goods, his case was within this statute, and that the indict-
ment ought to be for breaking the king's house, called
Whitehall, and for stealing the goods of *Sir H. Hungate*,
divers persons being in the house.

(d) Hetley 64.

S. P. C. 129.

Summary 236,

237.

11. Coke 36.

(e) Folio 237.

238.

1. Hale 522,

523.

Kelynge 27.

BUT NOTE, This case is wholly omitted in the first
edition of *Hale's Pleas of the Crown*, and I cannot but think
that it is misprinted in the second; because such a robbery

seems by no means within the purview of this statute, which extends only to such robberies as are done to a man in such a place as may be called *his dwelling-house, or dwelling-place, his wife, children, or servants being at the same time within the same*.

But in the state of this case it seems to be admitted, that *Whitehall*, wherein the felony was committed, could not properly be called, nor ought to be laid in the indictment as the dwelling-house or dwelling-place of the said *Sir H. Hungate*, who was the person robbed, but of *THE KING*.

Also it seems to be admitted, that it is sufficient to set forth generally in the indictment, that divers persons were in the house, without shewing that they were under any relation to the person robbed, as his children or servants, &c. which (a) seems to be necessarily required by 5. and 6. Edw. 6. c. 9. And therefore I take it, that the statute here intended is not 5. and 6. Edw. 6. c. 9. but rather 1. Edw. 6. (b) c. 12. f. 10. or 39. (c) Eliz. c. 15. 8. P. C. 129. — Yet *quære*, for neither of these statutes seem to extend to this case as it is here put,

(a) Vide *Hetley* 64.

Summary 235, 236.

11. Coke 36.

8. P. C. 129.

Popham 84.

(b) Vide *sup.*

1. 87. (c) Vide *infra* f. 95, 96, 97.

However, 3. and 4. Will. and Mary, c. 9. seems fully to extend to it; by which it is enacted, “that all those who shall rob any dwelling-house in the day-time, any person being therein, or shall comfort, aid, abet, assist, counsel, hire, or command any person to commit such offence, being thereof convicted or attainted, or indicted, and standing mute, or challenging peremptorily above twenty, shall be ousted of their clergy.”

(d) See the statute of 3. & 4. Ph. & Mary, *supra* f. 45. 46.

But I do not (d) find that any statute excludes those from their clergy who are accessaries to a robbery in a booth or tent, except it be from the person of a man, in which case the accessaries before the fact seem to be excluded from their clergy by 3. and 4. Will. and Mary, c. 9. as shall be more fully shewn hereafter.

Sec. 94. It seems plain, that those who are guilty of a felony within these statutes, are excluded from their clergy by 3. & 4. Will. & Mary, c. 9. on an indictment in a foreign county in the same manner as if they had been convicted in the first county, as hath been more fully shewn, *sect.* 80, 81, 82, 83.

SECONDLY,

SECONDLY, As to such robbery in a house which no person is in at the time.

Stat. 95. It is recited by 39. Eliz. c. 15. "That then of late divers lewd and felonious persons, understanding that the robbing of houses in the day-time, no person being therein at the time, is not so penal as where some person is therein, had been emboldened to take their opportunity to commit many heinous robberies in breaking and entering divers houses, &c." and thereupon it is enacted, "That if any person shall be found guilty, and convicted by verdict, confession, or otherwise, according to the laws of this realm, for the felonious taking away in the day-time, of any money, goods, or chattels, being of the value of 5s. or upwards, in any dwelling-house or houses, or any part thereof, or any out-house or out-houses, belonging and used to and with any dwelling-house or houses, although no person shall be in the said house or out-houses at the time of such felony committed, then such person shall not be admitted to the benefit of his clergy."

Stat. 96. Notwithstanding the words of the purview of this statute seem plainly to include all felonious takings to the value of five shillings out of an house, &c. whether with or without force; yet since the mischief complained of in the preamble, and intended to be redressed, is the frequent committing of many "heinous robberies in breaking and entering, &c." and since all other (a) statutes, excluding the benefit of clergy from robberies in houses, have been construed to extend to such larcenies only as are accompanied with a breaking of a house, or of some part of it, it seems agreed, (b) that this statute also shall extend only to such a felonious taking as is accompanied with the like breaking.

Stat. 97. It seems agreed, (c) that a chamber in one of the *Inns of Court*, wherein a person usually lodges, is properly a dwelling-house within this statute, and may be so called in an indictment, because every owner of such a chamber hath a separate interest in it. But that a lodging in *Whitehall* or *Somerfet-house* is not (d) a dwelling-house within this statute; from whence it seems to follow, that a robbery in such a lodging is not excluded from the clergy by this statute, if any person were at the time in any other part of the palace, because the whole is but one dwelling-house.

Stat. 98. It seems agreed, (e) that no accessory is ousted of his clergy by this statute.

(a) Sup. f. 77.
87, 88. 92. 96.
(b) Kelynge
30. 58. 69. 70.
Sum. 237, 138.
2. Hale 256.
11. Coke 36.
Cro. Car. 473.
474.

(c) C. Car.
473.
1. Jones 394.
Summary 81.
237.
2. Hale 338.
Kelynge 27. 52.
Cowper 5.
See Bk. 1. c.
38. sect. 13.
(d) Kelynge
37. 52.
Vide Sup. f. 93.

(e) Sum. 237.
2. Hale 357.
1. Hale 527. 528.

(a) C. Car.
473, 474.
2. Hale 358.
Note. That
the same case
is in 1. Jones
394.
but this point
is not taken
notice of.

Also it hath been adjudged, (a) that he who stands by and abets another while he breaks and enters the house, and afterwards divides the money with him, but doth not actually enter the house himself, is not within the statute. The reason whereof seems to be this, that the words, "If any person shall be convicted, &c. of a felonious taking, in a dwelling-house, &c." shall, in so penal a law, be intended only of an actual taking, and not of a constructive one. But this seems an extremely nice case, and if it were a new point, and not confirmed by experience, the authority of it might perhaps be justly questioned; for if the person who only stood by and entered not the house, had actually entered it, and the other only had taken the money, and had not given him any part of it till both had gone out of the house, in this case as well as in the other, it might be said, that he who actually received not any part of the money till he was gone out of the house, was guilty only of a constructive taking in the house, and consequently not within this statute. But I cannot easily persuade myself but that in such a case both must be adjudged equally within the statute; and why not as well in the other, it seeming an uncontroverted (b) rule, that where divers are present and abet one another in committing any felony, the act of one shall be looked on as the act of all.

(b) Vide sup.
c. 29. f. 7, 8.
11.
Vide Foster
357.

And upon this ground, as I take it, it hath been always agreed, that those who are present, and abetting, when a murder or robbery is committed, are all of them equally excluded from their clergy, whether they actually gave the stroke or took the money, or not; and yet the statutes to this purpose mention only those who shall be found guilty of murder or robbing, &c. Nor do I find any resolution to the contrary on any other statute concerning clergy, except only the (c) statute of stabbing, whereon it hath been adjudged, (d) that the person only who gives the stab is within the purview of it: but this seems plainly to depend on the particular circumstances of this offence, which is excluded from clergy in respect of the cruelty and bloody mind of him who gives the stab, which certainly is peculiar to himself.

(c) 1. Jac. 1. 8.
(d) Aleyn 44.
Sum. 58.
Bk. 1. c. 30.
f. 72.
Aleyn 43.
Stiles 86.
Foster 356.
1. Hale 468.
Balkold 542.

Farresly 129. 2. Ld. Raym. 842.

Sec. 99. However it is certain at this day, that by the express words of 3. & 4. Will. and Mary, c. 9. "Whoever shall comfort, aid, abet, assist, counsel, hire, or command any person or persons to break any dwelling house, shop, or warehouse thereunto belonging, or therewith used, in the day-time, and feloniously take away any money

“ money, goods, or chattel of the value of 5s. or upwards
 “ therein being, although no person shall be within such
 “ dwelling-house, shop, or warehouse, being convicted or
 “ attainted, or being indicted and standing mute, or chal-
 “ lenging peremptorily above twenty, shall be excluded
 “ from their clergy.”

SecT. 100. BUT NOTE, That this clause mentioning only a felonious taking in a dwelling house, shop, or warehouse thereunto belonging, and not mentioning out-houses in general, as 39. Eliz. doth, seems to have prevailed before; and therefore I take it that an assistant to such a felony in an out-house, not being such a shop or warehouse, without entering into it, is clearly intitled to the benefit of his clergy since this statute, however it might be disputed *Supra f. 98.* before.

SecT. 101. NOTE ALSO, That the accessaries before to such a felony in any out-house, not being such a shop or warehouse, are still intitled to the benefit of their clergy, because the only (a) law which excludes them is the (b) (a) *Sum. 227.* above-cited clause of 3. & 4. Will. & Mary, c. 9. which ex- (b) *Supra* tends only to such felonies “ in a dwelling-house, shop, or f. 99.” warehouse thereunto belonging.”

SecT. 102. But all principals in any felony within the said statute of 39. Eliz. are excluded from their clergy by the same statute upon any conviction, whether upon an indictment or appeal; and by the said statute of 3. (c) and 4. Will. (c) *Sup. f. 48,* and Mary, upon an outlawry, standing mute, or peremp- 49. tory challenge of more than twenty, upon an indictment, whether in the same county in which the felony was first committed, or in a different (d) county. (d) *Supra sect. 81, 82, 83.*

THIRDLY, As to robbery in general.

SecT. 103. It is enacted by 3. and 4. Will. and Mary, c. 9. “ that all and every person or persons that shall rob any
 “ other person, or shall comfort, aid, abet, assist, counsel,
 “ hire, or command any person or persons to commit
 “ such offence, being thereof convicted or attainted, or
 “ being indicted and standing mute, or challenging peremp-
 “ torily above twenty, shall not have the benefit of his
 “ clergy.”

VI. As to BURGLARY.

SecT. 104. If any person be in the house at the time of the breaking, (e) and thereby put in fear, the principal is ex- (e) *Vide 11.* cluded *Coke 35, 36. 2. Hale 367, 368. Sup. f. 34, 36. 40.*

cluded from his clergy by 1. Edw. 6. c. 12. f. 10. in all cases, except that of challenging more than twenty, and by 25. Hen. 8. revived (a) by 5. and 6. Edw. 6. or at least by 3. and 4. Will. and Mary, c. 9. upon such a challenge, upon an indictment.

(b) Popham 42. 52. 1. Anderson 302. Moor 660. 4. Coke 40. Bk. 1. c. 38. sect. 11. (c) 11. Coke 35. Summary 233. *NOTE.* 25. Also the principal in every burglary, whether (b) any person were in the house at the time or not, is excluded from his clergy by 18. Eliz. c. 7. upon a (c) conviction by verdict, outlawry, or confession; and by 3. and 4. Will. and Mary, upon standing mute, or challenging peremptorily more than twenty upon an indictment.

(d) 11. Coke 36. Summary 233. 234. *SECT. 106.* Also by (d) the same statute of 3. and 4. Will. and Mary, c. 9. "Every person who shall counsel, hire, or command any person to commit any burglary, being thereof convicted, or attainted, or being indicted, and standing mute, or challenging peremptorily above twenty, shall not have his clergy."

VII. AS TO ARSON.

(e) Sum. 233. 2. Hale 345. 346. 11. Coke 29. &c. (f) Supra f. 10, 11, 12, 13. 30. 32. (g) Supra f. 43. 44. *SECT. 107.* It hath been clearly (e) settled, since *Poulter's case*, that the principal (f) not being in holy orders, is excluded from clergy upon an indictment in all cases, except outlawry, by 23. Hen. 8. and 25. Hen. 8. as (g) revived by 5. and 6. Edw. 6. c. 10. And it is certain that he is excluded upon an outlawry on an indictment by 3. and 4. Will. and Mary, c. 9.

(b) Sup. sect. 25. 45. *SECT. 108.* Also accessaries to the fact before, maliciously, are excluded in all cases by 4. and (b) 5. Ph. and Mary, c. 4.

(i) S. P. C. 130. 2. Hale 376. (k) Sup. sect. 42, 43, 44. For the other offences which have been excluded from clergy by the statutes which created them, vide Index, "Felonies without Clergy." *SECT. 109. NOTE.* That by 1. Edw. 6. c. 12. f. 14. (i) Every lord of parliament is allowed his clergy in all cases wherein others are excluded by that act, except wilful murder, and consequently cannot be denied his clergy for any other felony wherein it was grantable at common law, unless it be ousted by some statute made since the first year of Edw. 6. or (k) revived by 5. and 6. Edw. 6. c. 10.

By these statutes clergy is taken away from the several offences described by legal technical terms of well-known signification, *murder, robbery, rape, and burglary*; and where clergy is taken away from the offence generally, without other circumstance, it is taken away from the offender under every circumstance in which his case may be considered; but in the cases above-mentioned aiders and abettors are not once named, nor are they described by any terms importing that the legislature intended to cast them *Voster 357, 358.*

As to THE THIRD GENERAL POINT of this chapter, *viz.*
At what time the benefit of clergy is demandable.

SECT. 110. It seems, (a) that it might be demanded by the ancient common law as soon as the prisoner was brought to the bar, before any indictment or other proceeding against him; for it is plain, that anciently the clergy claimed, and were in a great measure indulged, a privilege of being wholly (b) free from secular jurisdiction for crimes punishable with loss of life or member. But after the statute of *Westminster* 1. c. 2. which strictly enjoined the ordinaries not to suffer clerks, who have been indicted by solemn inquests, to be delivered without due purgation, the judges soon made a settled rule (c) not to deliver any clerk to the ordinary, before he had been first indicted and arraigned, and his offence had been inquired of and found by an inquest of office, which was done both to the end that if the prisoner were found guilty, he (d) might absolutely forfeit his goods (which anciently were saved by a purgation), and also that the Court might be apprised, whether it were proper, from the circumstances of the case disclosed upon such an enquiry, to deliver the clerk to the ordinary generally, in which case he was allowed to make his purgation (e), or specially, (f) *absque purgatione faciendâ*. But this practice being found inconvenient to prisoners, because they lost their goods if found guilty by such inquiry, and yet could take no challenge to any of the jury, it being but an inquest of office; it hath been the general practice (g) ever since the reign of *Henry the sixth*, to oblige those who demand the benefit of clergy to plead and put themselves upon their trial, under (h) pain of being dealt with as those that stand mute, whereby they forfeit their goods (i) without any inquiry concerning their crime; but yet (k) cannot be denied their clergy, where they should be intitled to it in case they were convicted, unless they be specially excluded by some statute. But after a clerk hath put himself upon his trial, and the inquest are charged with him, it is said that he (l) may, if he desire it, be admitted to his clergy, before the jury come back; but shall not forfeit his goods unless they find him guilty.

(a) S. P. C. 131. 185. 5. Coke 110. Regi. 68. Plowden 162. Contra 40. Affize 42. 23. Ab. F. Corone 91. B. Forf. 5. Hobart 289. it is holden, that the goods are not forfeit without a conviction. (c) H. P. C. 240. Hobart 288. 289. S. P. C. 139. 5. Coke 109. (f) Vide F. Cor. 109. 417. Sum. 240. Rastal 121. Hob. 288. 289. Kelynge 100. (g) Sum. 239. 2. Summary 378. 2. Inst. 164. F. Corone 53. 58. S. P. C. 131. Salkeld 61. Finch. 463. Hobart 288. (b) F. Cor. 53. so said in a note of a case in 3. H. 7. 1. But I do not find it made out by the books at large. But this is clearly holden 3. H. 7. 12. Ab. F. Cor. 53. (i) Sup. c. 30. f. 19. (k) 8. H. 4. 3. 4th. F. Corone 72. Sup. c. 30. sect. 24. (l) S. P. C. 131. Finch 463.

Sec. 111. Also I take it to be generally agreed in the later (a) books, that a person may demand his clergy after a *non legit* recorded; and also after judgment given against him, whether of (b) death, or of (c) *paine fort et dure*, or of (d) outlawry, &c. as well as before judgment, and even (e) under THE GALLOWS, if there be a judge there who has power to *arraign* it; as a justice of the king's bench, if the party were condemned there; or a justice of gaol-delivery, if he were condemned before him, and the commission of gaol-delivery be not (f) yet adjourned, and according to some (g) opinions, even though the commission were adjourned.

(a) Sum. 239. 240. 2. Hale 388, 379. 330. S. P. C. 132. Finch 363, 364. F. Corone 99. 109. Dyer 205. This seems doubtful. 12. Affize 15. Ab. F. Cor. 117. Con. F. Corone 233. (b) 40. Affize 42, 23. F. Cor. 91. Dyer 183. 34. H. 6. 49. F. Corone 20. B. Clergy 1. (c) Summary 239. 2. Hale 380. Sup. c. 30. sect. 24. (d) 9. E. 4. 28. 8. H. 4. 2. F. Corone 72. (e) 34. H. 6. 49. Ab. F. Cor. 20. B. Clergy 1. Summary 239, 240. Dyer 205. S. P. C. 132. Crompton Jur. 126. (f) S. P. C. 132. Summary 240. Cor. Juris. 126. (g) As it seems from Dyer 205. 2. Hale 379.

As to THE FOURTH GENERAL POINT of this chapter, *viz.* Whether the benefit of clergy shall be allowed where it is not demanded.

Sec. 112. I take it to be generally agreed, that notwithstanding it was anciently the (b) usual method for the ordinary to demand the criminal as his clerk, before the Court allowed him the benefit of his clergy, yet there was no (i) necessity that any such demand should be made by THE ORDINARY, but that the Court might without it admit a person to the benefit of his clergy upon sufficient evidence of his being a clerk, as upon his producing letters of orders, or reading as a clerk, &c. except he appeared to have been guilty of sacrilege, or of breaking the prison of the ordinary; in which cases it is said to have been in a great measure left to the (k) discretion of the ordinary, whether he should have his clergy or not. And as there is no necessity that the ordinary should demand the benefit of clergy for a clerk; so (l) neither doth there seem to be any that the prisoner himself should demand it, where it sufficiently appears to the Court that he has a right to it in respect of his being in orders, &c.; in which case, if the prisoner do not demand it, it seems to be left to the discretion of the judge, whether he will allow it him or not.

(b) Bract. b. 3. c. 9. West. 1. ch. 2. 2. Inst. 163, 164. S. P. C. 130. 9. E. 4. 28. 12. Affize 15. 34. H. 6. 49. Kelynge 99. (i) S. P. C. 131, 132, 133. Hobart 289, 290. F. Corone 117. B. Clergy 19. See the following section. But this matter seems to be left doubtful, 12. Affize 15. Ab. B. Clergy 9. 34. H. 6. 49. Kelynge 99. F. Cor. 44. 120. 191. 9. E. 4. 28. F. N. B. 66. (k) Vinc sup. sect. 9. F. Cor. 112. 120. S. P. C. 135. 27. Affize 42. Ab. F. Cor. 205. (l) S. P. C. 131. F. C. R. 191. 254. 26. Affize 19. Summary 239. 2. Hale 321. 378, 379. B. Clergy 1. 9. B. Corone 73. Hobart 289.

AS TO THE FIFTH GENERAL POINT of this chapter, viz. Who is to judge whether a person who demands the benefit of clergy, have a right to it or not.

SECT. 113. I take it, that in all cases the temporal judge is to determine both whether the crime be within the benefit of clergy, and also whether the person who demands it be qualified to demand it or not. For notwithstanding it had its (a) original commencement from the canon law, yet it being no (b) otherwise to be allowed here than as it hath been received by, and is agreeable to the common or statute law, whereof the temporal courts are the judges, it seems very reasonable that all questions (c) of this kind be determined by those courts. And therefore even in those cases wherein by the old books the ordinary seems to have been allowed a discretionary power of demanding or refusing a clerk, as where he hath been guilty of (d) sacrilege, and also in cases wherein it is said generally, that a prisoner hath no right to his clergy, as where he is convict of (e) heresy, &c. it seems to be taken as a ground by *Staundforde*, that the temporal judge, where the ordinary refuses a prisoner, has a power to determine whether still he may be allowed his clergy or not. And this seems to be grounded on good reason; for otherwise in such cases the ordinary by such pretences might have an absolute power of controlling the temporal courts in a matter properly determinable by such courts. And therefore whatever point it may turn upon, whether a prisoner ought to have his clergy or not, as the validity of his letters of orders, or his being a heretick convict, &c. howsoever the temporal courts may pay the highest regard to the certificate of THE ORDINARY; yet I take it to be generally (f) holden, that they only are finally to determine whether upon the whole the prisoner be well intitled to his clergy, or not, because the ordinary is not in this respect esteemed as a judge, but (g) only as a minister to the court. However it was certainly the (h) settled practice (while the method of trying the prisoner's capacity of receiving orders was by putting him to read a verse), for the judges of the common law to over-rule the ordinary as to the point, whether the prisoner read as a clerk or not; and to record a *legit* or *non legit*, according to their own judgment.

See the notes to the other parts of this and the foregoing section; yet 9. E. 4. 28. this matter seems to be left doubtful. Vide F. Corone 44. Ab. B. Cler. 7. F. N. B. 66. (g) 7. E. 4. 29. Ab. F. Fines 24. B. Clergy 17. B. Ordinary 16. 24. H. 6. 49. Ab. F. Fines 19. B. Clergy 1. 7. H. 4. 41. Ab. B. Clergy 2. Ordinary 20. 15. H. 7. 9. Ab. F. Imprisi. 28. B. Ordinary 11. Kelynge 51. 89. Finch. 463, 464. S. P. C. 131, 132, 133, 141. Summary 240. 2. Hale 378. 381. 21. E. 4. 21. Ab. B. Clergy 18. (h) Kelynge 28, 31. 9. E. 4. 28. Ab. F. Corone 32. B. Ordinary 12. See the cases cited to the precedent letter.

Sec. 114. But the necessity of such an ability to read in the case of a peer, was taken away by 1. Edw. 6. (a) c. 12. f. 15. by which it is enacted, "That in every case where
(a) Sup. sect. 109. S. P. C. 29, 130. "any of the king's subjects shall upon his prayer have the
"privilege of his clergy, &c. every lord having place and
"voice in parliament, shall by virtue of that act of com-
"mons grace, upon his request or prayer, alledging that he
"is a lord or peer of this realm, and claiming the benefit of
"this act, though he cannot read, without any burning in
"the hand, loss of inheritance, or corruption of blood, be
"adjudged, deemed, taken, and used for the first time only,
"to all intents, constructions, and purposes, as a clerk con-
"vict, and shall be in case of a clerk convict, which may
"make purgation, without any further or other benefit or
"privilege of clergy, to any such lord or peer from
"thenceforth, at any time after, for any cause to be al-
"lowed, &c."

Sec. 115. The necessity of such reading is also taken away, as to every common person, by 5. Ann. c. 6. by which it is enacted, "That if any person convict of such felony
"for which he ought to have the benefit of clergy, pray
"the benefit of that act, he shall not be required to read,
"but shall be punished as a clerk convict."

As to THE SIXTH GENERAL POINT of this chapter, viz. How far the ordinary was punishable at law for demanding or refusing a clerk against law.

Sec. 116. It seems agreed, (b) that anciently this was such a contempt for which his temporalities might be seized: but since the statute of 25. Edw. 3. c. 6. which provides,
(b) F. Coro. 32. 191. 233. 9. E. 4. 28. 21. E. 3. 3. "That prelates shall be admitted to pay a reasonable fine
B. Contempt 19. "for contempts to writs of *quare non admittit*, and such like,"
S. P. C. 132. it seems to have been generally (c) agreed, that the ordinary
Hobart. 290. is liable only to be fined, but to no such seizure for a con-
2. Inst. 164. tempt of this kind, as in obstinately (d) persisting to return
See the notes under the next letter. that a prisoner reads as a clerk, or the contrary, &c. against the declared sense of the Court.

(c) 9. E. 4. 28. Ab. F. Corone 32. Bro. Clergy 7. 7. F. 4. 29. Ab. F. Fines 24. B. Clergy 17. Ordinary 16. 34. H. 6. 49. Ab. F. Fines 19. B. Clergy 1. 15. H. 7. 9. Ab. F. Imprisi. 28. B. Ordinary 11. Kelynge 28. 51. Finch 463. 2. Inst. 164. Yet see the contrary holden the very next year, 26. Assize 19. Ab. F. Corone 193. and also 7. H. 4. 41. Ab. B. Clergy 2. Ordinary 20. And S. P. C. 132. (d) See the books cited to the other parts of this section.

As to THE SEVENTH GENERAL POINT of this chapter, viz. In what manner a clerk was to be delivered to the ordinary, and afterwards demerited by the common-law.

Sect. 117. It seems (a) plain, that anciently wherever a clerk was delivered to the ordinary by a temporal judge, his person ought to be kept in the ordinary's prison, till (b) he had been tried before him by a jury of twelve clerks. For the clergy never pretended to an absolute exemption from all kind of punishment for their crimes, but only to a privilege of being tried only by ecclesiastical judges; and this was anciently so far indulged them, that after they had once been delivered to the ordinary, they could not afterwards be remanded to any temporal court, before the statute of 8. Eliz. c. 4. set forth more at large section 122, &c. either for the same crime wherewith they had been charged in such court, or for any other (c) committed before the time when the benefit of clergy was allowed them, whether such other crimes were within the benefit of clergy, or not. And if they could acquit themselves on their trial before the ordinary of the crimes for which they had been arraigned in the temporal courts, which acquittal was called a purgation, (d) they anciently claimed a right not only to be delivered out of prison, but also to be restored (e) to their goods, &c. But to render such purgation the more difficult, and also to delay the delivery of great offenders as much as possible, the judges anciently often refused (f) to deliver them to the ordinary till they had been arraigned of all the crimes whereof they stood indicted. But after the statute of (g) 25. Edw. 3. the judges could not refuse the delivery of clerks convict in respect of any crime whereof they had not been actually arraigned; and therefore they used to arraign them at once for all the crimes whereof they stood indicted.

S. P. C. 108. Finch 464. Popham 107. (d) Finch 464, 465. (e) Sum. 241. c. Coke 110. S. P. C. 185. In the Register 68. there are three writs to this purpose. S. P. C. 52. 185. 192, 193. Register 68. Vide 1. Rich. 3. c. 3. (f) F. Corone 394. 461. B. Clergy 24. 30. S. P. C. 56. 108. Summary 213. B. Corone 11. (g) S. P. C. 108. 142. Dyer 214, 215.

2. Hale 382, 383, &c. (a) Br. l. 3. c. 9. S. P. C. 137. (b) See the Stat. of West. 1. c. 2. 2. Inst. 163, 164. S. P. C. 137. 138. if the ordinary suffered a clerk to go at large without making such purgation, he might be fined by the temporal courts. 15. H. 7. 9. 9. E. 4. 28. (c) And this privilege was expressly confirmed 25. E. 3. c. 5. and appears from the recital of 8. Eliz. c. 4. Vide Dyer 214, 215. Summary 213. 249. Anderson 114. (d) Sum. 241. S. P. C. 138. (e) Sum. 241. 5 Coke 110. Bracton and

Sect. 118. And if such clerks could not purge themselves upon such a trial, I do not (b) find that they were anciently liable to any greater punishment than degradation, and the (i) loss of their goods, and the profits of their lands, unless they had been guilty of apostacy, &c. But afterwards, (k) Straundforde in the places cited to the precedent letter seem to hold generally, that degradation was the only punishment; but I suppose that they mean the only punishment to the person. (k) S. P. C. 140, 141. See C. Jac. 431.

by a provincial constitution, if they were notoriously scandalous, they were to be kept in a perpetual prison, on slender diet, &c.

Sec. 119. If the ordinary had refused to admit a clerk delivered to him to make his purgation, he might be compelled ^(a) by a special writ for that purpose.

(a) Bract. 1. 3.

c. 9. sect. 3.

S. P. C. 137, 138. 15. H. 7. 9. Cro. Jac. 431. B. Corone 223.

Sec. 120. But this privilege was often very much abused; and therefore after the statute of *Westminster* 1. c. 2. which requires that no clerk shall be delivered without due purgation, the courts of common law would never deliver over a clerk to the ordinary, without a *(b)* previous enquiry into, or trial of his crime; whereupon if the clerk were found guilty, he absolutely forfeited his goods, and the judges would *(c)* often in their discretion make a special delivery *absque purgatione faciendâ*; as where it appeared that a prisoner was a common *(d)* thief, &c. or where in an appeal of robbery a restitution of the goods stolen had been awarded *(e)* to the appellant, which judgment they would not suffer to be contradicted by a purgation. And both in such a case, and also, *à fortiori*, where a clerk is admitted to his clergy after an attainder, whether by an express judgment or by outlawry, &c. or even after a confession, *(f)* though he were not specially delivered *absque purgatione faciendâ*, the ordinary seems, by the stronger *(g)* opinions, to have been liable to an escape, if he had admitted him to his purgation, because it could not but contradict a judgment, or the party's own confession, which is the highest conviction. Neither was any purgation thought lawful without a previous notice to the *(h)* king of the time when it was intended to be made.

(b) Sup. sect.

117.

(c) Sum. 240.

s. Inst. 195.

Hobart 289.

(d) S. P. C.

139.

Hobart 289.

F. Corone 247.

(e) Finch 464.

S. P. C. 139.

F. Corone 109.

247.

(f) Qu. S. P.

C. 138, 139.

But it seems

agreed, that

a clerk might

be admitted to

his purgation

after a con-

viction by

verdict.

F. Corone 393.

s. Assize 5.

Ab. F. 145.

Corone 16.

Corone 56.

Corone 136.

Corone 289.

Corone 128.

Corone 247.

Corone 450.

Corone 18.

Corone 13.

Corone 176.

Corone 152.

(g) S. P. C. 42. 138. 27. H. 6. 7. Ab. F.

Corone 16. 13. E. 4. 3. Ab. B. Cor. 158. F. Corone 38. 3. H. 7. 12. Ab. F.

Corone 56. 136. 9. E. 4. 28. Ab. B. Corone 55. B. Corone 4. Finch 464, 465.

Con. Hobart 289. F. Corone 109. 128. 247. 450. 18. Assize 13. Ab. F. Corone

176. Ut. 2. Thelol. B. 1. c. 15. sec. 26. (b) Finch 464. S. P. C. 138. F.

Corone 152.

As to the EIGHTH GENERAL POINT of this chapter, *viz.* What shall be done to one who is allowed the privilege of clergy at this day, and how far it shall be for his benefit.

Sec. 121. It is enacted by 4. Hen. 7. c. 13. "That if any person not in orders, shall be convicted of murder, he shall be marked with an M. and if of any other felony, with a T. on the brawn of the left thumb, in open court, before

"before he shall be delivered to the ordinary." And it is said by (a) *Hale*, that by 3. Hen. 7. c. 1. a clerk convicted (a) *Sum. 240.* of manslaughter shall be committed, or bailed at discretion till the year be passed. But the contrary hath been (b) ad- (b) *Kelynge* judged; for the said statute mentions only those who are^{25.} acquitted of murder at the king's suit within the year and day; in which case it directs that they shall be committed or bailed till the year and day be passed, that they may be forthcoming, in order to answer to an appeal, if brought within that time. But it admits the clergy once had to be a good bar to an appeal, even after an attainder, and therefore cannot be thought to have intended to make provision in any case for the parties being forthcoming to answer an appeal after clergy hath been allowed him, which makes it ineffectual. But it is certain, that any person who hath his clergy may be committed for any time within a year by 18. Eliz. c. 7. f. 3. set forth more at large section 125.

Sec. 122. By 8. Eliz. c. 4. f. 3. it is recited, "That divers persons had oft-times committed fundry detestable felonies, for the which clergy is not allowable, and afterwards had fled to places remote where they were not known, and committed some other felony within the benefit of clergy, and being arraigned for the same had had their clergy allowed them, and thereupon been committed to the custody of the ordinary, the former offence being then not known, and so by that means could not after be impeached for the same, to the great encouraging of offenders using such practices of foreknowledge and set purpose for their discharge of the same."

Sec. 123. For reformation whereof it is enacted, "That every person or persons who shall hereafter, upon his or their arraignment for any felony, be admitted to the benefit of his clergy, and delivered to the ordinary for the same, and shall make his due purgation for the same offence or offences whereupon he was so admitted to his clergy, and shall, before the same admission to his clergy, have committed any other such offence, whereupon clergy is not allowable, and not being thereof indicted and acquitted, convicted or attainted, or pardoned, shall and may be indicted or appealed for the same, and thereupon put to answer, and ordered and used in all things according to the laws and statutes of this realm, in such like manner and form as though no such admission of clergy had been; any law, custom, or usage to the contrary notwithstanding."

3. Peer Wms.
448 to 451.

Sec. 124. And for the avoiding of fundry perjuries and other abuses in and about the purgation of clerks convict delivered to the ordinaries, it is enacted by 18. Eliz.

(a) 4. H. 7.
13. for which
see sec. 121.]

c. 7. "That every person who shall be admitted to his clergy shall not thereupon be delivered to the ordinary, but after such clergy allowed, and burning in the hand, according to the (a) statute in that behalf provided, shall forthwith be enlarged and delivered out of prison by the justices before whom such clergy shall be granted, that cause notwithstanding."

(b) 2. Bulst.
137.

Sec. 125. But by 18. Eliz. c. 7. f. 3. it is provided, "That the justices before whom any such allowance of clergy shall be had, shall and may for the further correction of such persons to whom clergy shall be allowed, detain and keep them in prison for such convenient (b) time as the same justices in their discretions shall think convenient, so as the same do not exceed one year's imprisonment."

Sec. 126. And by 18. Eliz. c. 7. f. 5. it is further provided, "That all persons admitted to their clergy shall, notwithstanding such admission, be put to answer to all other felonies whereof they shall be indicted or appealed, and not being thereof before acquitted, convicted, attainted, or pardoned, and shall in such manner and form be arraigned, tried, adjudged, and suffer such execution for the same, as they should have done, if, as clerks convicts, they had been delivered to the ordinary, and there had made their purgations; any thing in this act contained to the contrary notwithstanding."

Upon these statutes the following points seem most remarkable.

(c) *Supra*
f. 117.

Sec. 127. FIRST, Inasmuch as it plainly appears, not only from the preamble, but also from the express words of the above recited clause of 8. Eliz. c. 4. that it had nothing else in view but only to prevent the inconvenience that offenders should be discharged of crimes not within the benefit of clergy, by being admitted to their clergy for crimes within the benefit of it, as they were (c) before this statute; and inasmuch as the above-recited *proviso* of 18. Eliz. c. 7. though it be more largely worded than 8. Eliz. c. 4. hath a plain relation to it, and therefore may reasonably receive the same construction; it seems to have been agreed, (d) ever since these statutes, that a conviction for a felony within the benefit of clergy, and an allowance of clergy thereon, is as much a discharge of all precedent felonies

(d) *Sum.* 213.
249.
2. Hale 388.
1. Anderson
114.
Popham 107.

felonies within the benefit of clergy (though not of any others) as it was before these statutes.

Stat. 128. SECONDLY, Inasmuch as the statute of 18. Eliz. c. 7. is express, "That every person admitted to his clergy shall not be delivered to the ordinary, but after such clergy allowed, and burning in the hand, shall forthwith be enlarged and delivered out of prison, &c. with a proviso nevertheless, that for further correction he may be kept in prison, &c. and also with a further proviso that he shall answer to all former felonies, in the same manner as if he had made his purgation;" it seems to be the more prevailing opinion, (a) that a clerk convicted being admitted to his clergy, may either be taken to have a kind of a statute-pardon, or else to be in the same case as if he had made his purgation at the common law. (a) Kelynge 37. 131.

And both these constructions seem reasonable. For as to the first it may be said, that the statute, by ordaining that the party shall be forthwith enlarged and delivered out of prison, under certain *provisoes*, seems plainly to imply that he shall be liable to no other punishment, and consequently in effect pardons him. And as to the second it may be said, that the statute seems only to intend to take away the practice of making purgation, which had been so much abused, but not the benefit accruing to the subject by it, but rather to make it more universal, by giving the same advantage to all by a direct and express law, attended with no inconvenience, which before some only gained by an usurped practice, very frequently abused, and highly derogatory from the honour of the common law. But (b) (b) *s. Coke* *Sir Edward Coke* is of opinion, that it shall enure by way of purgation in respect of such persons only who might be admitted to make their purgation before the statute, and in respect of others by way of pardon. And (c) *Hobart* argues, that because many offenders before the statute might have their clergy, who yet could not be discharged by making their purgation, and the statute intends that all in general who are admitted to their clergy, shall be discharged, &c. and also because all purgations discredited a trial at law, therefore it is not reasonable to intend that the statute meant that such a discharge should enure by way of a purgation, but only by way of a statute-pardon. But to this it seems a reasonable answer, that it doth by no means follow, that because the statute intended, that such discharge should extend to persons who could not have the benefit of a purgation, therefore it did not intend that it should have the effect of a purgation; neither doth it seem to follow,

follow, that because a purgation discredited the acts of a jury, therefore such a discharge, if it have to some purposes the same effect as a purgation, must discredit them likewise.

Sec. 129. **THIRDLY**, Taking the statute to enure either by way of a statute-pardon, or purgation, it seems that (a) Sum. 241. it restores (a) the party to his credit, and consequently (b) Kelynge enables (b) him to be a good witness; which it hath been questioned whether a pardon by the king can do, as shall be set forth more at large in the chapter of Pardon. Also it seems agreed, that it gives him a capacity to purchase (c) goods, and to retain the (d) profits of his land, but gives him no right to be restored to those which he had at the time of the conviction, which, being vested in the king by the forfeiture upon the conviction, (c) shall not be de-vested either by a (f) pardon or (g) purgation. For it is certain that a pardon never avoids (b) any precedent legal act, as shall be more fully shewn in the chapter of Pardon. Neither would the common law endure that purgation, which was introduced by a connivance, or rather tolerated than allowed, should so far controul its proceedings.

(c) 12. Co. 121. 5. Coke 110. Summary 241. Co. Lit. 391. 3. H. 7. 12. F. Corone 53. 356. 393. F. Forfeit. 23. 34. B. Forfeit. 11. 8. H. 4. 2. Plowden 261. S. P. C. 115. 20. E. 4. 5. B. Corone 166. But it is holden 40. Ed. 3. 42. Ab. F. Corone 91. and B. Forfeit 5. that nothing is forfeited unless there be an attainder. Also it is said, that the profits of lands are not forfeited. 20. E. 4. 5. pl. 3. B. Corone 166. (f) 1. Saund. 361. 1. Levinz 8. 20. (g) Vide *supra* sect. 110. F. Corone 356. Finch 464. Con. F. Coro. 365. B. Forf. 113. N. B. 66. B. Clergy 28. (b) 1. Saund. 362. 1. Levinz 8. 120.

Sec. 130. **FOURTHLY**, Whether the statute enure as a pardon or purgation, it (i) seems to take from the spiritual court the power of depriving the party for the crime for which he has had his clergy; for if it enure as a pardon, surely it cannot be doubted but that it frees the party from all subsequent punishment, and consequently from a deprivation; and if it enure as a purgation, which is admitted (k) to have been a good bar to a deprivation before the statute, why should it not have the same effect as a purgation had formerly, in this as well as in other respects? Yet (l) *Watson*, in his *Clergyman's Law*, holds an opinion on the authority of (m) *Croke's* Second Report, that a clergyman may be deprived for manslaughter after he has had his clergy; not observing, as I suppose, that what is said in this book was only on the sudden, on a motion for a prohibition in the king's bench, and that in the same case a prohibition was afterwards actually brought and declared

on

on in the (a) common pleas, and judgment thereupon (u) Hobart solemnly given for the plaintiff upon open argument by all the judges.

Also a prohibition was granted in the like case 27. and 28. Eliz. Rotulo Hobart 294.

Sec. 131. FIFTHLY, It seems agreed, that where a person exempt from burning in the hand, either in respect of his (b) peerage or (c) orders, or a (d) special pardon, is admitted to the benefit of his clergy, he shall have the same advantage of the statute without being burnt in the hand as others shall have upon such burning; for the words of the statute, that the party, "after such clergy allowed, and burning in the hand, shall be enlarged, &c." shall have this construction, that he shall be enlarged, &c. upon burning where burning ought to be.

Sec. 132. It is holden, that after a man is admitted to his clergy, it is (e) actionable to call him felon, &c. because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. (f) And how far a person convicted of a crime within the clergy, and praying or being ready to pray it, but not actually admitted to it, shall be within these statutes, shall be considered Chapter thirty-seven.

(f) See Thomas Reilly's Case, Cases Cro. Law 360.

+ Sec. 133. But as burning in the hand afforded the offender an opportunity of concealing the punishment, it was conceived that by rendering this mark more visible, many evil-disposed persons might be deterred from offending; and accordingly by 10. and 11. Will. 3. c. 23. it was enacted, "That persons convicted of larceny within the benefit of clergy, who were liable to be burnt in the hand, should, instead thereof, be burnt with the usual mark in the most visible part of the left cheek nearest the nose, in open court, and in the presence of the judge." But very short experience evinced the necessity of repealing this clause, and that the desired effect of this stigma was rendered abortive by exposing the objects of it to public jealousy, and, by rendering them unfit to be entrusted in any service or employment to get their living in an honest and lawful way, made them more desperate.

Sec. 134. By 5. Anne c. 6. therefore it is enacted, "That in all cases where any person or persons shall be convicted of any theft or larceny who shall be liable to be burnt in the hand, they shall be burnt in the hand as formerly they ought or should have been before the making the said

“ act, and the judge or justices before whom such offender
 “ or offenders shall be tried and convicted, shall *also* at his
 “ or their discretion award and give judgment that such
 “ offender and offenders shall be committed to some house
 “ of correction or public work-house within the county
 “ or place where such conviction shall be, there to re-
 “ main without bail or mainprise for such time as such
 “ judge or justices shall then judge and award, not less
 “ than six months and not exceeding two years from the
 “ time of such conviction; an entry whereof is to be
 “ made of record, &c.: and if such offender escape, he
 “ shall be committed to some house of correction or pub-
 “ lic work-house within the county or place where he
 “ shall be retaken and kept to hard labour, &c. not less
 “ than twelve months, and not exceeding four years.”

Burning in
 the hand abo-
 lished, except
 in manslaughter,
 and in lieu
 of such burn-
 ing, the of-
 fenders shall
 be whipped,
 &c.

† *Seft.* 135. But it is recited by 19. Geo. 3. c. 74. f. 3.
 “ That the punishment of burning in the hand, when any
 “ person is convicted of felony within the benefit of clergy,
 “ is often disregarded and ineffectual, and sometimes may fix
 “ a lasting mark of disgrace and infamy on offenders, who
 “ might otherwise become good subjects and profitable mem-
 “ bers of the commonwealth;” and therefore it is enacted,
 “ That when any person shall be lawfully convicted at any
 “ session of *oyer and terminer*, or gaol delivery, or at any
 “ general or quarter sessions, of any felony within the
 “ benefit of clergy, for which he or she is liable to be
 “ burnt in the hand, the Court before which any person
 “ shall be so convicted, or any Court holden at the same
 “ place with the like authority, if such Court shall think
 “ fit, instead of such burning, may impose upon such of-
 “ fender such a moderate pecuniary fine as to the Court
 “ in its discretion shall seem meet. Or otherwise it shall
 “ be lawful instead of such burning in any of the cases
 “ aforesaid, except in the case of manslaughter, to order
 “ and adjudge that such offender shall be once or oftener,
 “ but not more than three times, either publicly or pri-
 “ vately whipped; such private whipping to be inflicted in
 “ the presence of no less than two persons besides the
 “ offender and the officer who inflicts the same; and
 “ in case of female offenders, in the presence of females
 “ only. And such fine or whipping so imposed or in-
 “ flicted, instead of such burning in the hand, shall have
 “ the like effects and consequences to the party, with
 “ respect to any discharge from the same, or other felo-
 “ nies, or any restitution to his or her estates, capacities,
 “ and credits, as if he or she had been burned or marked as
 “ aforesaid.”

+ *Seet.* 136. But it is provided, par. 4. "That nothing in this act shall abridge the said Courts from detaining and keeping in prison for any time not exceeding one year, or of committing to the house of correction for any time not less than six months, or exceeding two years, any offender as aforesaid; but that such offender may, if such Court shall think fit, after such burning or marking, or after such whipping or fine imposed by this act in lieu thereof, be so detained or committed and with such accumulated punishment in case of escape as before-mentioned."

This statute shall not take away the imprisonment and whipping inflicted by 3. Anne, c. 6.

+ *Seet.* 137. And it seems agreed (a), that judgment of TRANSPORTATION is only put in the place of judgment for burning in the hand, and not in the place of the actual burning itself.—I shall therefore proceed to consider the nature of that species of punishment.

(a) Rex v. Burridge, 3. Peere Wms. 439 to 504.

† CHAPTER THE THIRTY-THIRD

CONTINUED.

OF

TRANSPORTATION.

† **EXILE** or **TRANSPORTATION** is a species of punishment unknown to the common law of England ; and where it is now inflicted, it is either by the choice of the criminal himself, in order to escape capital punishment, or it is imposed by the express direction of some modern act of parliament : for no power on earth, except the authority of parliament, can send a subject of England, *not even a criminal*, out of the land against his will (*a*). The first introduction of it into our laws was in the reign of queen Elizabeth (*b*). But it seems to have taken place more nearly as now practised, about the time of the Restoration (*c*). It is said by a very elegant writer upon Crown Law (*d*), that the effect of transportation as practised in this kingdom “ is often beneficial to the criminal, and “ always injurious to the community. The kingdom is “ deprived of a subject, and renounces all the emoluments “ of his future existence. He is merely transferred to a “ new country ; distant indeed, but as fertile, as happy, as “ *civilized*, and in general as healthy as that which he hath “ offended ;” and from hence he concludes, that it may have operated as a temptation to the offence, and become an argument for the multiplication of capital penalties. But it is by no means proved that these evil consequences have resulted from the practice ; and whatever comforts the criminal may incidentally derive from the circumstances of his banishment, the society at large is certainly benefited by the temporary removal of a dangerous, and perhaps incorrigible individual. After the establishment of English colonies in America, therefore, it became in this country, as in all others which have had colonies, the most common sentence of criminals (*e*).

3. Peer Williams 37. and 460.

(a) 1. Com.

137.

(b) 39. Eliz.

c. 4.

Rastal's statutes 429.

Rymer, par.

2. page 36.

(c) Kelynge

45.

(d) Mr. Eden.

(e) Barrington 445.

† *Stat.* 138. Accordingly, it is enacted by 4. Geo. 1. c. 11.
“ That where any person shall be convicted of grand or
“ petit

For felonies within clergy.

“ petit larceny, or any felonious stealing or taking of
 “ money, or goods and chattels, either from the person
 “ or the house of any other, or in any other manner, and
 “ who by the law shall be entitled to the benefit of clergy,
 “ and liable only to the penalties of burning in the
 “ hand, or whipping (except persons convicted of buy-
 “ ing or receiving stolen goods, knowing them to have
 “ been stolen), it shall and may be lawful for the court
 “ before whom they were convicted, or any court held
 “ at the same place with the like authority, if they think
 “ fit, instead of ordering any such offenders to be burned
 “ in the hand, or whipped, to order and direct that they
 “ shall be sent to *America* for the space of seven years.”

For felonies
 excluded from
 clergy.

† *Seet.* 139. And it is further enacted, “ That where
 “ any person shall be convicted of any offence for which
 “ death by law ought to be inflicted, or where any offenders
 “ shall be convicted of crimes excluded from the benefit of
 “ clergy, and the king shall extend mercy to such offender
 “ upon the condition of transportation to any part of *Ame-*
 “ *rica*, and such intention of mercy be signified by one of
 “ his majesty’s principal secretaries of state, it shall and
 “ may be lawful to and for any court having proper autho-
 “ rity to allow such offenders the benefit of a pardon under
 “ the great seal.”

Receivers of
 stolen goods.

† *Seet.* 140. And it is further enacted, “ That it shall
 “ and may be lawful for the court as aforesaid to order
 “ and direct any person convicted of buying or receiving
 “ stolen goods, knowing them to be stolen, to be trans-
 “ ported as aforesaid for the term of fourteen years, in
 “ case such condition of transportation be general, or else
 “ for such other term as shall be made part of such con-
 “ dition, if any time be specified by his majesty as afore-
 “ said.”

See Foster 73.

The king may
 dispense with
 the sentence.

† *Seet.* 141. Provided nevertheless, “ That his majesty
 “ may at any time pardon and dispense with any such trans-
 “ portation, and allow of the return of any such offender or
 “ offenders from *America*.”

To have the
 effect of par-
 don.

† *Seet.* 142. And it is further enacted, “ That where
 “ any such offenders shall be transported, and shall have
 “ served their respective terms according to the order of any
 “ such court as aforesaid, such services shall have the effect
 “ of a pardon to all intents and purposes as for that crime
 “ or crimes for which they were so transported, and shall
 “ have so served as aforesaid.”

† *Seff.* 143. And it is further enacted by 6. Geo. 1. c. 23. " That all the powers and authorities given by the above act to any court before whom any felons or offenders tried for and convicted of any offences for which they may be transported to *America*, shall and may be observed and executed by any other subsequent court with the like authority held for the same county, riding, division, or liberty, where such felons or offenders were tried and convicted, notwithstanding such subsequent court shall happen to be held at or in any other term or place than that wherein such trials or conviction were or shall be." The power given to subsequent courts.

† *Seff.* 144. But the judges of assize, according to the circumstances of the case, frequently reprieved convicts tried before them, for the purpose of applying to the crown for a pardon on condition that such convicts should be transported to *America*; in which case such convicts were obliged to lie in gaol until the coming of the judges at the subsequent assize. To remedy this inconvenience it is enacted by 8. Geo. 3. c. 15. " That where any offender shall be convicted of any crimes excluded from the benefit of clergy, and the judge before whom such offender shall be convicted or condemned shall grant a reprieve for staying the execution of such offender, and recommend him to the crown as an object of mercy; if his majesty shall be pleased to extend his mercy to such offender on condition of transportation to any part of *America*, and such intention of mercy shall be signified by one or more principal secretary of state to the judge so recommending; it shall and may be lawful for every such judge of *oyer* and *terminer*, or gaol-delivery, to make an order for immediate transportation of every such offender, in the same manner as if such intention of mercy had been signified to him by a principal secretary of state during the continuance of the assizes at which such offender was condemned: and such order shall be considered as an order made at such assizes or place, and shall be as effectual to every intent and purpose, and shall have all the same consequences in every respect, as any order for the transportation of any offender made by any justice of *oyer* and *terminer*, and gaol-delivery, as aforesaid." Power of subsequent court in felonies excluded clergy.

† *Seff.* 145. But the English colonies in *America* having separated from their connection with *Great Britain*, the transportation of felons to that country became impracticable; and it is therefore enacted by 19. Geo. 3. c. 74. continued by 24. Geo. 3. *seff.* 2. c. 56. *seff.* 18. to the first of June Of transportation to parts beyond the seas.

June 1787, "That when any person at any session of
 "oyer and terminer or gaol-delivery, or at any quarter or
 "other general session of the peace in *England* or *Wales*,
 "shall be lawfully convicted of any grand or petit larceny
 "or any other crime for which he or she shall be liable by
 "law to be transported to *America*, the court may order
 "and adjudge, that such person shall be transported to any
 "parts beyond the seas, whether the same be situated in *Ame-*
 "*rica* or elsewhere, in such and the like manner and for
 "any term of years, not exceeding such and the same term
 "as and for which such person was liable to be transported
 "to *America*."

The former
 laws con-
 firmed.

(a) This sta-
 tute only re-
 lates to the
 offence of re-
 turning from
 transporta-
 tion, which
 see Book the
 first, page 245.

+ *Seçt.* 146. And it is further enacted, par. 2. "That
 "where any person so convicted shall, in consequence
 "thereof, be ordered to be transported beyond the seas;—
 "or if his majesty shall extend the royal mercy to any
 "offender convicted or attainted of any felony, by which
 "he or she is excluded from the benefit of clergy, or of
 "such statutes as are equivalent thereunto, upon the con-
 "dition of transportation to any parts beyond the seas as
 "afore said; then, and in any such cases, all laws now
 "in force with regard to the transportation of crimi-
 "nals to *America*, and particularly the 4. Geo. 1. c. 11.
 "the 6. Geo. 1. c. 23. the 16. Geo. 2. c. 15. (a) and
 "the 8. Geo. 3. c. 15. shall be in force, take place, and
 "enure, as if the same had been specially recited in this
 "act."

+ *Seçt.* 147. By the above statute the king was em-
 powered to appoint three supervisors for the purpose of
 purchasing ground, and to erect thereon two substantial
 houses, to be called PENITENTIARY HOUSES, for con-
 fining and employing convicts; but as this part of the act
 has never been carried into execution, it seems useless to re-
 cite it.

Punishment in
 lieu of trans-
 portation.

+ *Seçt.* 148. But it is further enacted by the said statute,
 par. 27. "That where any male person, at any session of
 "oyer and terminer or gaol-delivery in *England*, or great
 "session in *Wales*, shall be lawfully convicted of grand
 "larceny, or any other crime, except petty larceny, for
 "which he shall be liable by law to be transported to
 "any parts beyond the seas, the court before whom any
 "such person shall be so convicted, or any other court
 "holden at the same place with the like authority,
 "may in the place of such punishment by transportation order
 "and adjudge that such person, appearing to be of compe-
 "tent

“tent age (a), and free from any bodily infirmity, shall be punished by being kept on board ships or vessels properly accommodated for the security, employment, and health of the persons to be confined therein; and by being employed in hard labour, in the raising sand, soil and gravel from, and cleansing the river *Thames*, or any other river navigable for ships of burthen, or any port, harbour, or haven in *England*, such river, port, harbour, or haven, being previously approved and appointed for that purpose by an order of privy council, or any other service for the benefit of the navigation of the said rivers, ports, harbours, or havens, or in any other public works upon the banks or the shores of the same, under the management and direction of such superintendent as shall be appointed for the *Thames* by the justices of *Middlesex*, and for other rivers, &c. by the justices of the county where they are situated, or of such counties adjoining the same as the council shall direct, at their quarter-session, for such term, not less than one year, nor exceeding five years;—or in case such offender shall be liable to be transported for fourteen years, not exceeding seven years, as such court of *oyer and terminer*, and gaol-delivery, shall think fit to order and adjudge.”

(a) Therefore on conviction, the age of the offender is always enquired of, and recorded by the clerk of the assize, &c.

† *Sec.* 149. And it is further enacted, par. 28. “That where any person shall, at any session of *oyer and terminer*, or gaol-delivery, or great session of *England* or *Wales*, be lawfully convicted of any robbery or other felony for which he or she shall, by law, either under this statute, or under any other statute now in force, or hereafter to be made, be liable to suffer death without benefit of clergy, and his majesty shall extend the royal mercy to any such offender upon condition of being kept to hard labour, during any specified term, in any PENITENTIARY HOUSE to be erected pursuant to this act, or such offenders being MALES, upon condition of being kept to hard labour during any specified term, in the custody of such superintendent as aforesaid, for the benefit of the said navigation; and such intention of mercy shall be notified in writing by one of the principal secretaries of state to the court in which such offender shall be convicted, or to any other court of the same place with the like authority; or if no such court shall be sitting, then to any justice of *oyer and terminer*, or gaol-delivery, or justice of great sessions, by or before whom such offender shall have been convicted or condemned; such court or justice may and shall, immediately on receiving such notification, allow to every such offender

Hard labour on board the hulks.

“der

“ der the benefit of a conditional pardon, in the same
 “ manner as if there was a conditional pardon under the
 “ great seal ; and may and shall order that every such offend-
 “ der shall be kept to hard labour in such Penitentiary House
 “ as aforesaid, or in the custody of such SUPERINTENDANT
 “ as aforesaid, for the time specified in the notification from
 “ such secretary of state.”

How convicts
 may be re-
 moved.

† *Seet.* 150. And it is further enacted by 24. Geo. 3. sess. 2. c. 56. f. 6. extended to *Scotland* by 25. Geo. 3. c. 46. f. 4. “ That it shall be lawful for his majesty, from
 “ time to time, by an order in writing to be notified by
 “ one of his principal secretaries of state, or for any three
 “ or more of such justices of peace for any county or place
 “ in which any gaol shall be situated, as shall be authorised
 “ by his majesty, under his sign manual, to direct the re-
 “ moval of any MALE offender, who shall be under sen-
 “ tence of death, but reprieved during his majesty’s plea-
 “ sure, or under sentence or order of transportation, and
 “ who having been examined by a surgeon, &c. shall be
 “ fit to be removed from the gaol in which such of-
 “ fender shall be confined, to such place of confinement in
 “ *England* or *Wales* either at land or on board any ship or
 “ vessel in the river *Thames*, or any navigable or other
 “ river, or within the limits of any port of *England* or
 “ *Wales*, as his majesty or any three of such justices so
 “ authorised as aforesaid, shall from time to time appoint, un-
 “ der the management of any overseer to be appointed by
 “ his majesty, or any three or more of such justices au-
 “ thorised as aforesaid.—And every offender who shall be
 “ so removed shall continue in the said place of confine-
 “ ment, or be removed to and confined in any other such
 “ place as aforesaid, as his majesty or any three or more of
 “ such justices shall appoint, until such offender shall be
 “ transported according to law, or by the expiration of the
 “ term of such transportation, or otherwise, shall be entitled
 “ to his liberty ; or until his majesty, or any three or more
 “ such justices so authorised as aforesaid, shall direct the re-
 “ turn of such offender to the gaol from which he shall have
 “ been so removed.”

A certificate
 to be given.
 (a) So much
 of the 24. Geo.
 3. c. 56. as
 extends to
 authorise the

removal of offenders to temporary places of confinement, and 19. Geo. 3. c. 74. continued to June 1, 1793, by 28. Geo. 3. c. 24. f. 4.

† *Seet.* 151. And the clerk of assize is directed by the said act, 19. Geo. 3. c. 74. f. 29. and 24. Geo. 3. c. 53. f. 6, 7, 8. (a), &c. “ to give to the theriff or gaoler a cer-
 “ tificate in writing under his hand, containing an account of
 “ the Christian name, surname, and age of such offender, of

his

his or her offence, of the court before which he or she was convicted, and of the term for which he or she shall be so ordered to hard labour; and the said sheriff or gaoler shall with all convenient speed, after the making of such order, and the receiving such certificate, convey such offender to the place to which such order shall direct, and deliver him with the certificate to the governor or superintendant as aforesaid, who shall give a receipt in writing under his hand to the sheriff or gaoler delivering such offender, which shall be his discharge; and such governor or superintendant shall transmit the certificate to the clerk of the peace, to be inrolled among the records of the session."

† *Sett.* 152. But difficulties still occurred, notwithstanding the foregoing statute, of fixing proper places for the transportation of convicts, inasmuch that "there was such a want of convenient and sufficient room in many of the gaols within *England* and *Wales*, that very dangerous consequences were to be apprehended, unless some immediate provision was made for removing such offenders to some other place of confinement (a)." To remedy this inconvenience it was thought expedient to empower his majesty, with the advice of his privy council, to appoint certain places, as well out of his majesty's dominions as within the same, to which felons and other offenders might be transported: It is therefore enacted by 24. Geo. 3. *sess.* 2. c. 56. (b), which repeals 24. Geo. 3. *sess.* 1. c. 12. "That when any person or persons at any sessions of *oyer* and *terminer*, or gaol-delivery, or at any quarter or general session of the peace in *England*, or great session of *Wales*, or by 25. Geo. 3. c. 46. in *Scotland*, shall be lawfully convicted of grand or petit larceny, or any other offence liable to transportation, the court before which any such person shall be so convicted as aforesaid, or any subsequent court holden in the same county or place with like authority, may order and adjudge that such person shall be transported beyond the seas for any term of years, not exceeding the number of years or term for which such person is or shall be liable by any law to be transported; and in every such case it shall and may be lawful for his majesty, by and with the advice of his privy council, to declare and appoint to what place or places, part or parts beyond the seas, either within his majesty's dominions, or elsewhere out of his majesty's dominions, such felons or other offenders shall be conveyed or transported; and such court as aforesaid is hereby authorised and empowered to order such offenders to be transferred to the use of any person or persons, and

Of transportation to such places as his majesty shall direct.

(a) The preamble to 24. Geo. 3. *sess.* 1. ch. 12.

(b) The several clauses of this act are extended to Scotland, by 25. Geo. 3. c. 46.

" his

“ his or their assigns, who shall contract for the due performance of such transportation.”

Of such transportation for offences excluded clergy.

† *Stat.* 153. And it is further enacted by the said statute, “ That when his majesty, his heirs and successors, shall be pleased to extend mercy to any offender or offenders who shall be convicted of any crime or crimes, for which he, she, or they shall be by law excluded from the benefit of clergy, upon condition of transportation to any place or places, part or parts beyond the seas, either for term of life, or any number of years, and such intention of mercy shall be signified by one of his majesty’s principal secretaries of state, it shall be lawful for any court, having proper authority, to allow such offender or offenders the benefit of a conditional pardon, and (except in cases where such offender or offenders shall be authorised by his majesty to transport himself, herself, or themselves) to order the transfer of such offender or offenders to any person or persons who shall contract for the due performance of such transportation, and his or their assigns, for such and the same term of years for which any such offender or offenders shall have been ordered to be transported, or for such term of life or years as shall be specified in such condition of transportation as aforesaid.”

Convicts may be assigned to contractors, &c.

† *Stat.* 154. And it is further enacted, “ That such person or persons so contracting as aforesaid, his or their assigns, by virtue of such order of transfer, shall have a property in the service of such offender or offenders for such terms respectively.—And when any offender or offenders shall be convicted of any crime or crimes, for which he, she, or they, is, or are, by law, excluded the benefit of clergy, the judge before whom such offender or offenders shall be convicted, or any justice of the king’s bench, common pleas, or baron of the exchequer of the degree of the coif, in case the said offender or offenders shall have been tried at any court of *oyer and terminer*, or *gaol-delivery*, in *England*, or any justice of *Chester* or *Wales* (extended to *Scotland* by 25. Geo. 3. c. 46.), in case the said offender or offenders shall be tried and convicted within any of their respective jurisdictions, may, on such intention of mercy as aforesaid being signified to him by one of the said principal secretaries of state, make an order for the immediate transportation of such offender or offenders in the same manner as if such intention of mercy had been signified by one of the said principal secretaries of state during the continuance of the assizes or sessions at which such offender

“ or

"or offenders was or were condemned; and such order shall be considered as an order made at such assizes or sessions as aforesaid, and shall be as effectual, and have all the same consequences as any order for the transportation of any offender or offenders made by any justice of *oyer* and *terminer*, great sessions, or gaol-delivery, during the continuance of the assizes or sessions."

+ *Seet.* 155. And it is also enacted, par. 13. "That if any order for the transportation of any offender cannot be conveniently executed with respect to the place in such order mentioned, either the king's bench, or the court before which such person shall have been convicted, or any court holden for the same place having like authority; or (in Vacation time, and out of Term) for any two justices of the king's bench, common pleas, or barons of the exchequer of the degree of the coif, to order that such offender shall be transported to any other part or place beyond the seas, which shall have been appointed by his majesty for the transportation of such offenders, in such and the like manner, and for the same term of years, as such offender shall be liable to be transported for to the place mentioned in the original sentence or order; and such order shall be considered as made at the same time, and shall be as effectual to every intent and purpose, and shall have all the same consequences in every respect as the original order for the transportation of such offender." The place of transportation may be changed.

+ *Seet.* 156. It is also enacted, "That the person to whom such offenders shall be transferred as aforesaid shall, before they are delivered over, give security to transport them pursuant to their sentences, and procure such evidence of the landing of such offenders in the said parts beyond the seas respectively, as the nature of the case will admit of. And that the court aforesaid may appoint two justices where the offenders shall be convicted, to contract with any person for the performance of the transportation, and to order such security to be taken as aforesaid; and to cause the offenders to be delivered accordingly by their respective gaolers; which contract and security shall be certified by the justice to the next court to be filed of record. And all such securities shall be by bond in the name of the clerk of the peace, &c. &c." How convicts shall be transferred to contractors.

+ *Seet.* 157. And it is further enacted, "That the persons so contracting as aforesaid, and to whom such offenders shall be so delivered to be transported, may in VOL. IV. X such may carry them through any country

"such manner as they shall think fit, carry and secure the
 "said offenders in and through any county in *Great*
 "*Britain* towards the sea-port or place from whence they
 "are to be transported; and whoever shall rescue such of-
 "fenders, or assist therein, shall suffer death without benefit
 "of clergy."

The time of
 confinement
 to be part of
 the sentence.
 (a) Vide ante
 section 13.

† *Stat.* 158. But it is declared, par. 9. "That the
 "time during which any offender shall have continued
 "in gaol under sentence of transportation, or, being re-
 "moved under the provisions aforesaid (a), shall continue
 "confined, shall be taken and reckoned in discharge, or
 "part discharge, or satisfaction of the term of his trans-
 "portation."

Of transpor-
 tation to BO-
 TANY BAY.

† *Stat.* 159. Notwithstanding the provisions of the
 above statutes, it was found extremely difficult to fix upon
 proper places to which convicts might with propriety be
 transported; and the gaols, in every part of the kingdom,
 became so dangerously crowded, that at the meeting of the
 parliament in the twenty-seventh year of GEORGE THE
 THIRD, his majesty declared from the throne, "that a
 "plan had been formed, by his direction, for transport-
 "ing a number of convicts, in order to remove the incon-
 "venience which arose from the crowded state of the gaols
 "in different parts of the kingdom;" and recommended to
 the parliament such farther measures as might be necessary
 for this purpose.

24. Geo. 3.
 c. 56.

Stat. 160. In consequence of this recommendation, it
 is recited by 27. Geo. 3. c. 2. "That whereas by 24. Geo.
 3. c. 56. it is enacted, that when any person shall be law-
 fully convicted of grand or petit larceny, or any other of-
 fence for which such person shall be liable to be transport-
 ed, the court before which such person shall be convicted,
 or any subsequent court with like authority, may order that
 such person shall be transported; and that in every such
 case, his majesty, by the advice of his privy council, may ap-
 point to what place beyond the seas such felons shall be con-
 veyed," &c. &c.

Stat. 161. And it is also further recited, "That when his
 majesty shall extend mercy to any offender convicted of
 any crime excluded from the benefit of clergy, upon con-
 dition of transportation to any place, and such extension of
 mercy shall be signified by one of his majesty's principal
 secretaries of state, it shall be lawful for any court, having
 proper authority, to allow such offender the benefit of a con-
 ditional pardon, and (except where such offender shall be
 autho-

authorised to transport himself) to order the transfer of such offender to any person who shall contract for such transportation, &c. &c.

Sec. 162. " And whereas his majesty, by two several orders in council, hath judged fit, by and with the advice of his privy council, to declare and appoint the place to which certain offenders should be transported for the time or terms in their several sentences, to be THE EASTERN COAST OF NEW SOUTH WALES, OR SOME ONE OR OTHER OF THE ISLANDS ADJACENT :

Sec. 163. " And whereas it may be found necessary that a colony and civil government should be established in the place to which such convicts shall be transported, and that a court of criminal jurisdiction should also be established within such place as aforesaid, with authority to proceed in a more summary way than is used within this realm, according to the known and established laws thereof :

Sec. 164. It is therefore enacted, " That his majesty may, by his commission under the great seal, authorise the person to be appointed governor, or the lieutenant governor in the absence of the governor, of such place, as aforesaid, to convene from time to time, as occasion may require, a court of judicature for the trial and punishment of all such outrages and misbehaviours as, if committed within this realm, would be deemed and taken, according to the laws of this realm, to be treason or misprision thereof, felony, or misdemeanor." His majesty may authorise the governor or lieutenant governor of New South Wales to convene a court of judicature for the trial of offenders.

Sec. 165. And it is further enacted, " That the said court shall consist of the judge-advocate to be appointed in and for such place, together with six officers of his majesty's forces by sea or land : Which court shall proceed to try such offenders, by calling such offenders respectively before that court, and causing the charge against him, her, or them respectively to be read over ; which charge shall always be reduced into writing, and shall be exhibited to the said court by the judge-advocate ; and by examining witnesses upon oath, to be administered by such court, as well for as against such offenders respectively, and afterwards adjudging, by the opinion of the major part of the persons composing such court, that the party accused is or is not (as the case shall appear to them) guilty of the charge, and by pronouncing judgment therein (as upon a conviction by verdict) of death, if the offence be capital, or of such corporal punishment, not extending to capital punishment, as to the said court

Who are to be members of the court, and how they are to proceed in trying offenders.

“ shall seem meet; and in cases not capital, by pronouncing
 “ judgment of such corporal punishment, not extending to
 “ life or limb, as to the said court shall seem meet.”

Provost mar-
 shal to exe-
 cute the judg-
 ment of the
 court.

Sec. 166. And it is further enacted, par. 2. “ That
 “ the provost marshal, or other officer to be for that pur-
 “ pose appointed by such governor or lieutenant governor,
 “ shall cause due execution of such judgment to be had and
 “ made under and according to the warrant of such go-
 “ vernor or lieutenant governor in the absence of the
 “ governor, under his hand and seal, and not otherwise :
 “ Provided always, that the execution shall not be had or
 “ done on any capital convict or convicts, unless five per-
 “ sons present in such court shall concur in adjudging him,
 “ her, or them, so accused and tried as aforesaid, to be re-
 “ spectively guilty, until the proceedings shall have been
 “ transmitted to his majesty, and by him approved.”

If five mem-
 bers do not
 concur in ad-
 judging capi-
 tal offenders,
 the proceed-
 ings to be
 transmitted to
 his majesty.

Court to be a
 court of re-
 cord.

Sec. 167. And it is also enacted, par. 3. “ That the said
 “ court shall be a court of record, and shall have all such
 “ powers as by the laws of England are incident and be-
 “ longing to a court of record.”

CHAPTER THE THIRTY-FOURTH.

OF

PLEAS IN ABATEMENT.

AND now I come to PLEAS IN ABATEMENT.

Having already considered them so far as they particularly relate to appeals, indictments, and informations, in the several chapters concerning them; and having shown what pleas are good in abatement of an appeal (*a*); and, that an appellee may plead as many of them as he pleases, unless they be repugnant to one another, and afterwards take the general issue (*b*); and, that the same matters may be pleaded to an appeal on an arraignment thereon at the suit of the king, as on an arraignment at the suit of the party (*c*); and in the same chapter, what misnomers, &c. may be pleaded in abatement of an indictment (*d*); and, what pleas are good in abatement of an information (*e*); and having also considered demurrers in abatement (*f*); I shall in this place take notice only of the following particulars.

SECT. 1. FIRST, That it hath been holden (*g*), that it is no good plea in abatement of an indictment, as it is of an appeal (*b*) or information (*i*), that there is another indictment against the defendant for the same offence. But in such (*k*) a case the Court in discretion will quash the first indictment, if any fault can be found in it.

1. Jones 199. Vide the case of John Swan and Elizabeth Jefferies, Foster 105, 106. Also Rex v. Stratton, Douglas 240.

SECT. 2. SECONDLY, That where an indictment of a capital crime is abated, for a misnomer of the defendant's (*l*) christian name, the Court will not dismiss him, but cause him to be indicted *de novo* (*m*) by his true name, and arraign him again on such new indictment. For I take it to be settled (*n*) at this day, that regularly a defendant shall not be dismissed for an insufficiency in an indictment or an appeal for a capital crime.

11. Con. 12. H. 4. 41. Fitz. Misno. 18. Corone 88. B. Misno. 23. See the books cited c. 23, sect. 11. *State Tr. 78.*

Sec. 3. THIRDLY, That a defendant appearing *gratis*, and by attorney to an information, may (a) plead a *misnomer* in abatement, as well as if he had appeared in proper person; for if he be not the person intended, the attorney-general may reject the plea and sign judgment on a *nihil dicit*. But if he accept the plea, he thereby admits him that pleads it to be the person concerned to make a defence, and therefore shall not afterwards say that it doth not appear but that the plea might be put in by a stranger.

Water 16. *Sec. 4.* FOURTHLY, That a plea in abatement of the jurisdiction must be pleaded before the general issue.

Sec. 5. By 4. & 5. Ann. c. 16. s. 11. "No dilatory plea shall be received in any court of record unless the party offering such plea do, by affidavit, prove the truth thereof, or shew some probable matter to the Court to induce them to believe that the fact of such dilatory plea is true."

Stra. 1161. *Sec. 6.* And therefore it seems that a plea in abatement in an information *quo warranto* ought to be verified.

Butt. 1617. *Sec. 7.* It seems also that it is not necessary to verify a plea in abatement of an indictment of high treason on a trial at bar, but that on an indictment in the ordinary course it must be verified.

CHAPTER THE THIRTY-FIFTH

OF THE

PLEA OF AUTREFOITS ACQUIT.

PLEAS in chief are either, *in bar*; or, *the general issue*.

AS TO PLEAS *IN BAR*, having shewn already, what pleas of this kind to an appeal are good, which shew that the plaintiff had never any right to bring it (*a*): and where (*a*) Ch. 23. sect. 120. a *retraxit*, *nonsuit*, *discontinuance*, or *abatement*, of one appeal may be pleaded in bar of another (*b*): and where the (*b*) Sect. 121. to 133. bringing of an appeal against one person will be a bar to a subsequent one against another person not named in the first (*c*): and where a release will bar an appeal (*c*) Sect. 134. (*d*): and where an appellant may be barred as to one (*d*) Sect. 135. appellee, and continue his suit against the rest (*e*): and (*e*) Sect. 136. what pleas of this kind are consistent with the general (*f*) Sect. 137. issue (*f*): and what is a good plea in bar to an in- (*g*) Ch. 24. formation (*g*):

I shall, in this place only consider,

1. The plea of *autrefoits acquit*.
2. The plea of *autrefoits attain*.
3. The plea of *autrefoits convict*.
4. The plea of a pardon.

AND FIRST of the plea of *autrefoits acquit*:

Sect. 1. The plea of *autrefoits acquit* is grounded on this maxim, (*b*) that a man shall not be brought into danger of his life for one and the same offence, more than once. From whence it is generally taken, by all the books, (*i*) as an undoubted consequence, that where a

B. Appeal 9. 12. 19. B. Corone 11. Crompton 111. (*i*) See the authorities cited in all the other parts of this chapter, and 5. E. 3. 25.

(a) *Infra*
sect. 8.

(b) *Infra* 9.

(c) *Infra* 10.

(d) 25. E. 3.

44.

Ab. F. Corone

136. 41.

Affize 9. Ab. F. Corone 220. B. Corone 120. 2. Leonard 161.

Infra, section 14, 15. 47. E. 3. 16. Ab. F. Corone 104. B. Appeal 14.

The several
heads under
which this
rule is considered.

man is once found "*not guilty*" on an indictment or appeal free (a) from error, and (b) well commenced before any (c) court which hath jurisdiction of the cause, he may, by the common law, in all (d) cases whatsoever plead such acquittal in bar of any subsequent indictment or appeal for the same crime.

But for the more distinct understanding hereof I shall particularly consider,

1. How far he who pleads this plea must be ready to produce the record of his former acquittal.

2. Where a variance between the record of the former acquittal and the indictment or appeal to which it is pleaded, may be helped.

3. How far other discharges of a former prosecution have the same effect as an acquittal by verdict.

4. How far it is necessary that the indictment or appeal in the record of acquittal be free from error and well commenced.

5. Whether an acquittal in any court which has a jurisdiction be sufficient for this purpose.

6. How far an acquittal of a person as principal will bar a subsequent prosecution against him as accessory; *et à converso*, how far an acquittal of a man as accessory will bar a prosecution against him as principal.

7. How far the law is altered in these respects as to an indictment of death, by 3. Hen. 7. chap. 1.

As to the first particular, *viz.* How far he who pleads this plea must be ready to produce the record of his former acquittal.

§ 8. P. C.

154

1245.

Hale 221.

3. F. Corone 35. F. Mon. de Faint, 35. Radial 385. seems contrary.

with

sect. 2. I take it to be (c) agreed, that such plea being a plea in bar, and the record not in the custody of, nor the property of, him that pleads it, there is no need to plead

with a *profert suo pede sigilli*; (a) but the defendant shall (a) Co. Litt. 248. have a (b) day given him to bring it in. And there is in Brook a note of a (c) case in the time of Edward the third See the chapter of Pardons, wherein a plea of *autrefoits acquit* was disallowed, because the (b) Co. Litt. 248. defendant shewed forth the record when he pleaded it; and the book gives this reason, "That the record ought to come before the court by writ." F. Corone 232. (c) B. Corone 218.

But 26. Affize 15. Ab. F. Corone 189. 11. H. 4. 41. Ab. F. Mon. de Faits 128. B. Corone 29. 9. H. 7. 19. Ab. B. Appeal 89. seem contrary.

As to the second particular, viz. Where a (d) variance (d) s. Kebble between the record of the former acquittal, and the indictment or appeal to which it is pleaded, may be helped. 795.

Sect. 3. I take it to be clear, that if the nature of the crime be in (e) substance the same, a variance may generally (e) 14. H. 7. be helped by proper (f) averments. And therefore if a man be named in the first record *Yeoman*, and in the second S. P. C. 168. *Gentleman*, yet it seems (g) clear, that he may make good (f) S. P. C. the variance, with an averment that he only was meant under each addition. 105. Summary 246. See Cogge's Case, Cases

Crown Law 355. (g) Keilway 52.

Also if a man be acquitted of an indictment of murder or robbery *cujusdam* (b) *ignoti*, and afterwards arraigned (b) Sup. c. 25. on an indictment for the same fact, describing the person killed or robbed by his proper name, yet it hath been holden, (i) that he may plead the acquittal in bar, (i) Keilway 25. averring that both the indictments are for the very same felony. Dyer 283. F. Corone 159.

Also if the person killed be described by his proper name and surname in the first indictment, and by the same christian but by a different surname in the second, yet it hath been (k) adjudged, that he may plead an acquittal on the first in bar of the second indictment averring that the person so differently named was one and the same person. But it seems (l) adviseable in such case to add a further averment, that the person killed was known as well by the name in the first, as by that in the second indictment; S. P. C. 105. for if he were never known by the name in the first indictment, I much question whether the defendant could be found guilty upon it; and if he could not, it seems plain that his life having never been in danger by it, the ac-

B. Corone 29. 1. Roll. 168. (l) Summary 246. S. P. C. 105. Crompton 112.

quittal

(a) Sup. sect. 1. & infra l. 2. **quittal upon it (a) cannot be any bar to a subsequent indictment.**
9, 10.

But if there be no other variance between the first and
(5) Dyer 285. second indictment but only as to the (b) times when the
Summary 246. crime is alledged to have been committed, or as to the (c)
2. Hale 244. places being both in the same county, there is no doubt
22. Affize 35. but that regularly it may be helped by an averment that the
Ab. F. Cor. felony in both is one and the same, because neither the time
175. nor place laid in an indictment, &c. are material upon evi-
S. P. C. 105. dence, so that the defendant be proved guilty at any other
12. H. 4. (d) time before the indictment, or at any other place (c)
41. within the county. And it is holden by (f) *Staundforde*,
Ab. B. Cor. that an acquittal of murder in one county may be pleaded
29. in bar of a subsequent indictment in another county for
Variance 31. the same murder.
F. Mon. de
Faire 128.
23. Edw. 3.

44.
Ab. F. Cor. 136. 3. Affize 15. Ab. F. Cor. 166. Crompton 122. (e) Sum. 246.
2. Hale 245. S. P. C. 105, 106. (d) Summary 264. Saikeld 288. (c) See
the chapter of Evidence; and Summary 264. (f) S. P. C. 105: See Crompt. 12.

But this seems questionable, because all indictments are
local; and therefore if the first were laid in an improper
county, the defendant could not be found guilty upon it,
(g) Vide sect. and consequently was in no danger of his life, and there-
2. 3, 9, 10. fore (g) cannot plead an acquittal upon it in bar of a sub-
sequent indictment in the proper county. But if the first in-
dictment were in the proper county, the second cannot
but be in an improper one, and consequently the defend-
ant, not being liable to be found guilty upon it, cannot
be said to be reduced by it to the inconvenience of being
twice brought into danger of his life for one and the same
(b) Sup. sect. offence, the avoiding of which inconvenience (b) seems the
2. 3, 9, 10. chief inducement for which the law allows the plea of
autrefoits acquit.

Sect. 4. But if a man steal goods in one county, and
then carry them into another, in which case it is certain
(i) Sup. c. 23. (i) that he may be indicted and found guilty in either, it
sect. 47. c. 25. seems very reasonable, that an acquittal in the one county
sect. 38. and for such stealing may (k) be pleaded in bar of a subsequent
B. 1. c. 33. prosecution for the same stealing in another county, be-
sect. 9. cause the defendant may be altogether as well convicted
(k) 41. Affize in the one county as in the other; and therefore if he
9. could not bar the second prosecution by the acquittal or
F. Corone

220.
But this is
left doubtful, S. P. C. 105, 106. Summary 246. Crompton 112. B. Corone
239. 4. H. 7. 5. F. Corone 62.

the first, his life would be twice in danger from that which is in truth but one and the same offence, and only considered as a new one by a mere fiction or construction of law, which shall hardly (a) take place against a maxim made in favour of life. And as to the (b) objection, that the jurors of the one county can take no manner of conscience of what is done in the other, and consequently cannot try whether the felony whereof the party is indicted in the second county be the very same with that of which he is acquitted in the first, it may be answered, that it appears from the old books, that anciently the judges often satisfied themselves of the truth of an averment that the offences in both indictments were the same, by (c) witnesses, or by an (d) inquest of office, without putting it to a trial by jury, upon an issue joined, on the denial thereof by the prosecutor, which seems (e) to have been of later years the usual method. But granting that it is to be tried by such jury, I do not see how it follows, that because they cannot convict a defendant upon evidence of a fact done out of their own county, therefore they cannot collaterally inquire whether an offence laid in their own county be in substance the same with that done in another, since it cannot be denied but that in abundance of cases a jury of one county may receive evidence of facts done in another. To which may be added, that in THE YEAR-BOOK of 4. Hen. 7. 5. pl. which is the (f) chief authority for the contrary opinion, it is admitted that an acquittal of an appeal of larceny in the one county, may be pleaded in bar of a subsequent appeal in the other; because such an appeal intitles the plaintiff to a restitution of the goods, whereof being once barred he is barred for ever. But granting this to be a good reason, which yet it seems difficult to make out, the very same may be said at this day as to an indictment, which, since (g) 21. Hen. 8. c. 11. intitles the prosecutor to a restitution also. Besides, taking the law as it stood formerly, why may not a jury of one county try whether a felony therein indicted be the same whereon the party was before acquitted in another county, in the case of a second indictment, as well as of a second appeal?

SECT. 5. It seems (b), that it is no plea to an appeal of larceny, that the defendant hath been found not guilty in an action of trespass brought against him by the same plaintiff for the same goods; for larceny and trespass are entirely different.

Also

(a) Sup. c. 12.
sect. 13. and
c. 29. sect. 25.
and c. 29.
sect. 35.
(b) 4. H. 7. 5.
F. Corone 62.

(c) 26. Aff.
15.
Ab. F. Corone
289. 1.
B. Corone 98.
41. Affice 9.
Ab. F. Cor.
220.

(d) 3. Aff. 25.
11b. F. Cor.
166.
See sect. 6.

(e) 9. H. 7. 19.
Ab. B. App.
89.

(f) Vide B. 1.
Cor. 139. or
140.
F. Corone 62.
S. P. C. 106.
Summary 246.
2. Hale 245.

(g) Vide sup.
c. 23. sect. 55.
56.

(b) 1. Rich. 3.
14. 2.
B. App. 225.
Vide infra c.
36. sect. 70.

(a) Co. Litt. 146. Also it seems a general (a) rule, that a bar in action of an inferior nature will not bar another of a superior.

2. Rich. 3.

24. 25.

(b) 3. Inst.

313.

Summary 246.

2. Hale 246.

Foster 325.

(c) S. P. C. 105.

Summary 244.

B. Corone 11.

But it is clear, that an acquittal of one felony is (c) no manner of bar to a prosecution for another in substance different, whether committed before or at the same time with that of which he is acquitted; and therefore if a man commit a burglary, and steal the goods of *A.* and *B.* and be indicted for the burglary and stealing the goods of *A.* and acquitted, it hath been adjudged, (d) that he cannot plead such acquittal to an indictment for stealing the goods of *B.* But it seems agreed, that he may plead it to a second indictment for the burglary.

(e) Kely. 30.
32.

As to the third particular, viz. How far other discharges of a legal prosecution have the same effect as an acquittal by verdict.

(e) C. 23. sect.

129, 130, 131.

(f) 11. H. 4.

42.

Ab. F. Mon.

de Facts 128.

B. Corone 29.

B. Appeal 33.

B. Variance 31.

Vide S. P. C.

106.

Sec. 6. Having shown already in the (e) chapter of Appeals, how far the discharge of one appeal will bar another, I shall only add in this place, that notwithstanding the (f) allowance of a pardon, or any other bar of one indictment, seems to be pleadable in bar of another, and by the like reason whatever hath been allowed a good bar of one appeal may be pleaded in bar of another.

(g) 2. Hale

246.

Intra f. 7.

(h) S. P. C. 169.

(i) 3. Inst.

213.

Crompton 111.

4. Coke 46.

Yet it seems, that no other discharge of an indictment will bar an appeal, and no other discharge of an appeal will bar an indictment, but only an (g) acquittal by battel, or an acquittal by verdict on the general issue, finding the defendant's (h) innocence; as where it finds him not guilty on such an issue, on an indictment or appeal of any felony whatsoever, or where it finds him (i) guilty of homicide *se defendendo*, or *per infortunium*, on an indictment of murder.

(k) Dyer 120.

Crompton 112.

But it hath been adjudged, (k) that where a demurrer by an appellant to a tender of battel to a plea, hath been adjudged against him, yet the appellee may be afterwards arraigned at the suit of the king.

(l) Sum. 245.

2. Hale 249.

Sec. 7. It is said by Sir Matthew Hale in the (l) chapter of *Autrefoits acquit*, that an acquittal by battel in an appeal is no bar of an indictment. But I find no other authority

of a subsequent prosecution, notwithstanding such error; the best reason whereof seems to be this, that such error is (e) saved by the appearance.

(4) 20. H. 7. *Seft. 9.* It seems agreed, (b) that an acquittal on an appeal brought by one who had no right to bring it, as
 17. 19. by any other woman (c) except the wife of the deceased,
 21. H. 6. 28. or by any other man (d) except the next heir, is no more
 29. a bar to an appeal by another appellant, or to an indictment,
 Ab. B. App. than an acquittal on an insufficient appeal or indictment
 41. Crompton 112. would have been.
 S. P. C. 106. Summary 245.
 1. Hale 249. (c) Sup. c. 23. sect. 36, 37, 38. (d) Sup. c. 23. f. 39, 40, 41, 42.

As to the fifth particular, *viz.* Whether an acquittal in any court which has a jurisdiction be sufficient for this purpose.

(e) 9. Affize *Seft. 10.* Notwithstanding the (e) opinion in the *Book of Affizes*, that no acquittal in any other court can be any bar to a prosecution in the court of king's bench, because that is the highest court, I take it to be settled (f) at this day, that an acquittal in any court whatsoever which has a jurisdiction of the cause, is as good a bar of any subsequent prosecution for the same crime as an acquittal in the highest court. And therefore it hath been adjudged (g), that an acquittal of murder at a grand session in *Hales*, may be pleaded to an indictment for the same murder in *England*. For the (h) rule is, that a man's life shall not be brought into danger for the same offence more than once.

(g) 1. Lev. 118. 1. Siderfin 179. (h) Sup. c. 25. f. 41, 42.

As to the sixth particular, *viz.* How far an acquittal of a person as principal will bar a subsequent prosecution against him as accessory; and *à converso*, how far an acquittal of a man as accessory will bar a prosecution against him as principal.

(i) Kely. 25, *Seft. 11.* It seems to be (i) settled at this (k) day, that
 26. an acquittal of a man as principal is no bar of a subsequent
 Vide Foster prosecution against him as *accessary after the fact*, because
 362. such acquittal clears him only of the charge of having committed the fact, which being a crime entirely different from that of receiving him that hath committed it, there seems no more reason that the acquittal of it should bar a prosecution for the receipt, than if they were offences that bore no manner of relation to one another.

(k) 17. Affize 10.
 Ab. F. Cor.
 380.
 103. Lamb. b. 2. c. 7. (*) Cor. F. Cor. 282.

But it is (a) holden in many books of good authority (con- (a) S. P. C.
trary to what is admitted (b) to have been the ancient law), 44-105.
that the acquittal of a man as principal is a good bar of a Kelynge 25
subsequent prosecution against him as accessary before; for 26.
it is said, that such an accessary is in some measure, (c) guilty c. 7.
of the fact, and therefore that an acquittal which clears a Summary 224.
man from being guilty of the fact, doth by consequence 244.
clear him from being such an accessary. 1. Hale 622.
2. Hale 244.
Crompton 43.

112. But the principal authority in the old book is 2. E. 3. 20. Ab. F. Corone 150.
which seems inconsistent with itself; for the words are for an example, that a man may
in such case be twice put to answer, We award that you go quit. And F. Corone 282.
is contradicted by all other books; for it says, that a man acquitted as principal, can-
not be so much as arraigned as an accessary after. And 27 Affize 10. Ab. B. Co-
rone 105. and F. Corone 200. extend only to the case of an accessary after. And
8. H. 5. 6. Ab. F. Corone 463. expressly goes upon the supposition, that a man may
be found guilty as principal, upon evidence which only proves him accessary. (b) S.
P. C. 105. F. Corone 424. 2. Hale 244. (c) Vide sup. c. 29. sect. 13, 14. 1. Hale
626. 2. Hale 244. Kelynge 25, 26.

And this seems reasonable upon the supposition that a man
may be found guilty of an indictment against him as prin-
cipal, upon evidence which only proves him to have been
an accessary before. But if a man cannot be found guilty
of such an indictment upon such evidence, as it is strongly
(d) holden that he cannot, it may with great reason be (d) Sum. 266.
said, that the acquittal of him as principal no way acquits Keilway 102.
him as accessary before; for if so, he might save himself Dalison 14.
by a mere slip in the indictment, and bar all other pro-
secutions by an acquittal on a trial, which in truth never (e) Vide sup.
brought him into (e) danger of his life. And it is upon f. 1. 8. 9, 10.
this supposition, as I suppose, that it is holden in some (f) Keilway
(f) books, contrary to those above cited, that one who 107.
has been acquitted as principal may be tried again as ac- Dalison 14.
cessary before, as well as after. Lamb. b. 2.
c. 7.
Foster 362.

Mr. Justice Foster contends with some warmth for the opinion of our author,
that the acquittal of a principal is no bar to a subsequent prosecution against him as
an accessary before the fact in the same offence. 3. Discourse 362. And in Fe-
bruary 1668, Samuel Atkins was tried on two several indictments; first, as prin-
cipal, next as accessary in the murder of Sir Edmondbury Godfrey. 2. State
Trials 798.

Sect. 12. But it seems (g) agreed, that an acquittal of a (g) Crompt.
man as accessary before, or after, is no bar to a subsequent 43.
prosecution against him as principal. B. Corone
186.

1. Hale 622. 625. 2. Hale 244.

Sect. 13. Also it hath been holden, that an acquittal 1. Hale 622.
of a man as accessary to one principal, will not save him Foster 362.
from

from being arraigned afterwards as accessory to another in the same fact. But for this I shall refer to Chapter 29. Section 46.

As to the seventh particular, viz. How far the law is altered in these respects as to an indictment by 3. Hen. 7. c. 1.

- (a) Sup. c. 25. *Seft.* 14. It seems agreed, (a) that by the common law
 1. 15. an acquittal on an indictment might be pleaded in bar of
 21. H. 6. 28. an appeal of death, in the same manner as an acquittal
 29. of any other felony might be pleaded in bar of a subse-
 Ab. B. App. quent prosecution; and therefore in favour of appeals a
 41. general practice was introduced, (b) not to try any person
 44. E. 3. 25. on an indictment of death till after the year and day had
 Ab. B. App. been passed, by which time it often happened that all was
 12. forgotten. For reformation thereof it is enacted, " That
 Summary 244, " if any man be slain or murdered, and thereof the slayers,
 245. " murderers, abettors, maintainers and comforters of the
 47. E. 3. 16. " same, be indicted, that the same slayers and murderers,
 Ab. F. Coro- " and all other accessories of the same, be arraigned and de-
 ne 104. " termined of the same felony and murder at any time
 B. Appeal 33. " at the king's suit, within the year after the same felony
 35. 102. " and murder done, and not tarry the year and day for any
 2. Leonard " appeal to be taken for the same felony or murder. And
 161. " if it happened any person named as principal or ac-
 But this is " cessary to be acquitted of any such murder at the king's
 made a quare, " suit within the year and day, that then the same justices
 17. Aflize 1. " afore whom he is acquitted, shall not suffer him to go
 (b) Vide sup. " at large, but (c) either to remit him again to the pri-
 c. 25. *seft.* 15. " son, or else to let him to bail after their discretion till
 Crompton 111. " that year and day be passed. And if it fortune the same
 Kelynge 95. " felons or murderers, and accessories to be arraigned, or any
 96. 97. 98. " of them to be acquit, or the principal of the said fe-
 2. Leon. 161. " lony, or any of them to be attainted, the wife or next
 Summary 244, " heir to him so slain, as shall require, may take and
 246. " have their appeal of the same death and murder, with-
 S. P. C. 107. " in the year and day after the same felony and murder
 B. Appeal 9. " done, against the said persons so arraigned and acquit,
 32. Aflize 8. " and all other their accessories, or against the accessories
 Ab. B. Ap- " of the said principal, or any of them so attainted, or
 peal 119. 45. " against the said principal so attainted, if they be on
 25. " live, and the benefit of his clergy thereof before not
 Ab. Br. Ap- " had; and that the appellant shall have such and like
 peal 12. " advantage, as if the said acquittal or attainder had not
 11. H. 4. 94. " been, the said acquittal or attainder notwithstanding. (d)".
 Ab. B. Ap- "
 peal 361. "
 43. Aflize 14. "
 Ab. B. Ap- "
 peal 75. "
 (c) Vide su- "
 pra c. 33. "
 121. "
 F. N. D. 251. "
 Crompton 111. "
 (d) Vide S. P. C. 107. and Rastal's Statutes title " Murder" 2.

Sec. 15. It seems (a) agreed, that this statute shall not (a) Sum. 244.
 be construed to extend to any other appeal but that of death, 2. Hale 250.
 nor to any other acquittal but upon an indictment; from S. P. C. 107.
 whence it follows, that an acquittal on an indictment, or
 appeal, for any other (b) felony except death, may still (b) Sum. 244.
 be pleaded in bar of an appeal for the same crime, and that S. P. C. 107.
 an acquittal on an appeal of death (c) may still be pleaded (c) Sum. 244.
 in bar of an indictment, in the same manner as by the com- Crompton 111.
 mon law. S. P. C. 107.

Sec. 16. How far a person found guilty of manslaughter, or of homicide *se defendendo*, on an indictment of murder, is liable to be tried again upon an appeal by force of this statute, shall be considered in the next chapter.

CHAPTER THE THIRTY-SIXTH.

OF AUTREFOITS ATTAINT.

IT seems to be generally agreed, (a) that wherever a man (a) Sum. 247.
is attainted of felony, either by judgment upon a verdict, 2. Hale 251,
or by (b) outlawry, or abjuration, whether upon an in- 252.
dictment or appeal, he may plead such attainder to any S. P. C. 107.
subsequent indictment or appeal, for the same or any other 12. Coke 100.
felony. 6. Coke 13.
3. Inst. 213,
214.

Supra c. 23. sect. 38. (b) Yet this is made a *quære*, 28. E. 3. 90. but no notice is
taken of the *quære* in the abridgment of the case in F. Corone 136. Vide 18. H. 8. 2.
12. Coke 100.

And two reasons are given for such plea to a second prosecution for the same felony.

FIRST, (c) because the life of the defendant was in danger (c) 9. H. 7.
by the first; and it is against a maxim of law to bring a 19.
man into such danger more than once for one and the same Ab. B. App.
offence. 89.
B. Corone 11.

SECONDLY, (d) because, generally, the proceeding in such (d) S. P. C.
second prosecution cannot be to any purpose, because the 107.
party is dead in law by the first attainder, and hath forfeited all that he can forfeit, and therefore it is said, that it
is equally absurd to attaind him a (e) second time, as to
attempt to kill one who is already dead. And that is the
only (f) reason I find any where given for the plea of (e) B. Ap-
autrefoits attaind of one felony to a prosecution for another. peal 9.
44. E. 3. 44.
Ab. F. Corone 95. 6. H. 4. 6. Ab. F. Corone 217. B. Appeal 10. Popham 107.
7. H. 4. 37. F. Escheat 14. B. Corone 11. F. Corone 81. 95. Contra, 4. E. 4. 11.
F. Corone 27. See the chapter of Judgment. (f) See the books cited to the pre-
cedent letter.

But where both of these reasons fail in the first case, and the latter of them in the second, and also in some other cases, for special reasons; the plea of *autrefoits attaind* seems to be of little effect.

As in the following instances:

SECT. 2. FIRST, Where the first attainder is reversed for error, after which it can neither be pleaded to a prosecution for the same or any other felony; because by such

(a) S. P. C. 106. reversal the attainder is of no (a) more force than if it had never been: and if an acquittal on an erroneous indictment or appeal will not bar a subsequent prosecution, surely *a fortiori* an attainder reversed will not do it. But it is agreed to be a good bar while it stands unreversed, because it is not void but voidable only.

Sect. 3. SECONDLY, Where the attainder was at the suit of the king and (b) pardoned, and after the party is prosecuted upon an appeal. For it is an allowed maxim, that "the king cannot bar the suit of the subject;" and if he cannot bar an appeal by pardoning the offender before it appears whether he be guilty or innocent, there cannot but be much less reason that he should bar it after the guilt appears by a judgment upon record.

(b) B. Cor. 12. E. 3. 90. Ab. F. Cor. 113. S. P. C. 107. 3. Inst. 213. Crompton 113. 6. H. 4. 6. Ab. F. Cor. 227. B. Appeal 10. Con. 12. Coke 100.

Sect. 4. THIRDLY, Where a person attainted of felony is afterwards indicted of high treason, whether before or after his (c) attainder. For the judgment of death in high treason is not only different from that in felony, but the forfeiture is also more general (extending to land in tail as well as to land in fee-simple, since (d) the statutes of 26. Hen. 8. c. 13. and 33. Hen. 8. c. 20.). But if the felony were first committed, it seems (e) agreed, that the title of escheat to the felon's lands in fee-simple, vested in the lords of whom they are holden from the time of the felony, shall not be defeated by the subsequent attainder for the treason, as it would be if the treason had been first committed.

(c) 1. H. 6. 5. 22. Ab. B. Treas. 11. F. Corone 2. 3. Inst. 213. Popham 107. Summary 213. 214. 2. Hale 252. and the observation to the contrary in 2. Inst. 390. and S. P. C. 107. Crompt. 113. on the above cited Year-Book of H. 6. 5. to the plain purport of it seems repugnant. (d) Co. Litt. 372. 392. See the chapter of Forfeiture. (e) 3. Inst. 213. S. P. C. 137.

Sect. 5. FOURTHLY, Where an appellee of larceny hath a second appeal brought against him, hanging the first, and afterwards is attainted in the first. — In which case, according to some (f) opinions, the court may, in order to intitle the second appellant to a restitution, inquire by an inquest of office, and according to others (g) by an inquest taken at the mise of the parties, whether such appellee be guilty of the larceny, or not.

(f) Sup. c. 23. sect. 53. and c. 28. sect. 7. 2. Hale 252. F. Corone 379. 7. H. 4. 31. Ab. F. Cor. 81. B. Appeal 21. Vide 44. E. 3. 44. Ab. B. Appeal 11. F. Corone 95. (g) 4. E. 4. 11. S. P. C. 66. Summary 212. 248. B. Appeal 93. F. Corone 26. 6. Ed. 4. 4. Ab. B. Cor. 147.

And the law seems to be the same in relation to an indictment of (b) larceny since the statute of 21. Hen. 8. c. 11. which intitles the prosecutor to a restitution of his goods, upon the offender's being found guilty, &c. in the same manner as upon an appeal.

Also it hath been (a) adjudged, that a person attainted (a) 3. Inf. 213. 215. is as liable to answer a personal action, as if he had not been attainted. For otherwise his attainder would give him a privilege and protection, which the law is far from intending in allowing the plea of *autrefoits attain* to a second prosecution for a new crime, which is chiefly grounded on this reason, that the law will not suffer an absurd and vain thing in attainting one who is attainted already. C. Eliz. 516. Con. C. Eliz. 213.

SECT. 6. FIFTHLY, Where a person attainted of one felony is afterwards prosecuted as a principal in another, and others are also prosecuted together with him as his accessaries. In which case it is said, (b) that for the benefit of public justice he is compellable to plead, &c. to the second prosecution in the same manner as if he had not been attainted, because otherwise the accessaries to such second felonies could not (c) be brought to their trials for want of a conviction of their principal. (b) Popham 107. (c) Sup. c. 29. from sect. 36. to sect. 45.

SECT. 7. It seems (d) clear, that a judgment against a man on an indictment or action of trespass, is no bar to an indictment or appeal of larceny for the same taking, because trespass and larceny are offences of a different nature, and the judgment for the one entirely differs from that for the other. (d) Sup. c. 35. sect. 5. 7. H. 4. 35. F. Cor. 82.

Also I take it to be in a great measure (e) agreed, that the judgment of *peine forte et dure* in one felony is no bar to a prosecution for another, because such judgment neither corrupts the blood, nor forfeits the lands, as an attainder doth. But it seems questionable, whether it may not bar a second prosecution for the same felony, because the life of the party was brought into danger by the first. (e) 3. Inf. 213. Crompton 113. Dyer 308.

SECT. 8. It is (f) said, that *autrefoits attain* or *convict* was no plea for one who had broken the prison of the ordinary. — But for this I shall refer to the books cited Chapter the thirty-third (g). (f) S. P. C. 31, 32. (g) Sect. 9, 10.

SECT. 9. It is certain, that an attainder on an indictment of death is no bar to an appeal, by reason of 3. Hen. 7. c. 1. set forth more at large in the precedent chapter, which gives an appeal against persons attainted of death, the benefit of clergy thereof being not had, as it is certain that it cannot at this day. But it seems (b) agreed, that in all other cases the plea of *autrefoits attain* is still of the same force as it was by the common law. (b) Sum. 247. 2. Hale 250, 251.

CHAPTER THE THIRTY-SIXTH

CONTINUED.

O F

AUTREFOITS CONVICT.

THE PLEA OF AUTREFOITS CONVICT seems chiefly to depend on this reason, (a) That the party ought (b) (a) *Sup. sect. 1.* not to be brought twice into danger of his life for the same (b) 4. *Coke* crime. 39, 40, 47. 2. *Leonard* 83.

Sec. 10. Upon which ground it seems (c) agreed, that (c) 4. *Coke* a conviction on an appeal or indictment of burglary, or 39, 40. other felony, may be pleaded to an indictment or appeal 2. *Leonard* 83. for the same felony; and that a conviction of manslaughter Crompton in an appeal of death may be pleaded in bar of a subsequent 113. indictment or appeal of the same death; and that the rea- Kelynge 94. son why such a conviction on an indictment of death can- 98. not be pleaded to an appeal as well as to an indictment 4. *Coke* 46. (unless the person so convicted be admitted to his clergy, 1. *Salk.* 62, 63. or at least have prayed it), (d) depends entirely on 3. *Hen. 7.* C. Car. 147. c. 1. which expressly giving an appeal against a person (d) 1. *Anda* attained on an indictment of death, who hath not had 68. his clergy, cannot but be thought to give it as well against 4. *Coke* 46. a person convicted, since every attainder includes a con- 3. *Modern* viction and more; and it is wholly owing to the default 156. of the Court, which shall not prejudice any one, that a Infra sect. 17. person convicted is not attained (e). But I do not find (e) *S. P. C.* any authority that a conviction of one felony may be 180. pleaded in bar of another; on the contrary, it is plain, that Sum. 247, 248. it was anciently the usual (f) practice, where a clerk was Crompton 113. indicted of several felonies, and tried and convicted of one (f) *F. Corone* of them, and demanded by the ordinary, not to deliver him 394, 461. *S. P. C.* 108. upon such demand, but to detain him in prison till he Sup. c. 33. had been arraigned of all the felonies whereof he stood in- sect. 117. dicted. Also it seems (g) agreed, that even after the statute Pream. 25. of 25. *Edw. 3. c. 5. de Clero*, a clerk convict of one felony E. 3. 5. might immediately, while he stood at the bar, be arraigned (g) *S. P. C.* 108. of any other. Dyer 215.

(a) Dyer 214.
215.
Sum. 248, 249.
Sup. c. 33. f.
117 to 121.
18. H. 8. 2.
3. Inst. 131.
Kely. 93. 103.
Crompt. 113.
F. Cor. 232.
(b) See these
statutes more
at large, ch. 33.
f. 121 to 130.

Seft. 11. But it seems to be admitted (a) as a general rule, that after a clerk convict was once delivered to the ordinary, he could not afterwards be impeached either for the same, or any other felony committed before such delivery to the ordinary, whether it were within the benefit of clergy or not: and though this be so far remedied (b) by 8. Eliz. c. 4. and 18. Eliz. c. 7. that a person admitted to his clergy for any felony shall not in respect thereof bar a subsequent prosecution for another felony not within the benefit of clergy; yet, as I take it, the law generally still continues as it was, as to the felony whereof the party who is admitted to his clergy is convicted, and also as to other felonies within the benefit of clergy committed before such admittance, whereof it seems agreed, that regularly one admitted to his clergy shall not be afterwards arraigned.

(c) 4. Coke 40.
Wetherell's
case 45, 46.
Crompton
101.
C. Jac. 282.
Yelver. 204.
205.
1. Bullst. 241.
See the cases
cited to the
next letter.
(d) 2. Leon.
167.
1. And. 68.
4. Coke 45, 46.
Kely. 93, &c.
3. Institute
161.
Coke Ent. 55.
Salkeld 63.
2. Hale 259. 390.

Seft. 12. It seems to have been long settled, that not only he who hath been admitted (c) to his clergy on a conviction of manslaughter, upon an indictment of murder, but also that he who, being called to judgment on such conviction, hath (d) prayed his clergy, but hath not been actually admitted to it, may bar any subsequent appeal for the same death, as he might by the common law. And so to the objection from the seeming absurdity, that if the law be so, he that hath his clergy on a conviction of manslaughter will be in a better case than if he had been wholly acquitted, it may be answered, that this doth not depend on any reasoning from the nature of the thing, but from the statute of 3. Hen. 7. c. 1. which expressly takes away the plea of *autrefoits acquit* in this case, but by suffering even persons attainted on an indictment of death who have been admitted to their clergy to plead such admission in bar of an appeal, plainly seems to have intended to leave the benefit of clergy as it stood before.

(e) Salkeld 63.
Kelynge 91.
92. 94. 104.
107, 108.
But the con-
trary seems to
be holden in
3. Inst. 131.
(f) Sup. c. 25.
sect. 15.
and the notes
roc 35. f. 14.
Kely. 94. 95.
96, 97 98.

Seft. 13. Also it hath been adjudged, (e) that it is not material whether the appeal, in bar whereof such conviction and clergy are pleaded, were depending at the time of such conviction, or not; since the judges (f) may, if they think fit in their discretion, proceed on an indictment of death, notwithstanding an appeal thereof be depending; and therefore as on the one side the party is liable to be hanged, if found guilty of murder on a verdict against him on such an indictment, pending an appeal, cannot but be equitable, that on the other side he should have the full benefit of the verdict, if found in his favour,

Sec. 14. But there have been many (a) opinions, that (a) 1. Sid. unless the Court call a man to judgment, on a conviction of 316. manslaughter, on an indictment of murder, he cannot de- Carth. 7. 18. mand the privilege of his clergy, and consequently cannot Kelynge 106. plead such conviction and clergy thereon had or prayed in Vide Dyer 214, 215, 296. bar of an appeal.

And accordingly it was solemnly resolved (b) by all the (b) 3. Modern judges, except one, in the latter end of the reign of king 154, 157, 158. James the second, that the Court might delay the calling a Kelynge 106. convict to judgment, to hinder him from praying his clergy (especially if an appeal be depending), in order to make him liable to an appeal.—But the contrary seems (c) to be fully (c) Skin. 670, settled in the case of *Armstrong v. Lisle*, wherein it was ad- 671. judged upon great deliberation, that a conviction of man- Carthew 394. slaughter, on an indictment of murder, and the (d) prayer 395. of clergy thereupon, may be pleaded in bar of an appeal of Kelynge 93. the same death, whether such prayer were made upon the 103, 104, 105. party being called to judgment, or not. For it seems to be 107. (e) admitted, even by those of the contrary opinion, that Salkeld 62, 63. the delay of the Court in not admitting a man to his clergy (d) But note, who prays it when called to judgment, shall no way prejudice that in this case the party him, but that he may bar an appeal by pleading a conviction was actually admitted to his clergy in the king's bench. and prayer of clergy as much as if he had been actually ad- (e) Vide sup. mitted to it. And why should it be more reasonable that sect. 12. the delay of the Court in not calling a man to judgment, 1. And. 68. shall put it in the power of the Court to make so high a pri- 4. Coke 45, vilege in favour of life wholly precarious and discretionary? 26. To which may be added, that a demand of clergy by a con- Kelynge 105. vict before he is called to judgment, seems in strictness to Salkeld 63. be as legal as a demand after a call to judgment; since when- ever a person appears to have a right to his clergy, as he seems plainly to do when his crime is found to be such as is within the benefit of it, it seems a necessary consequence that he has a right to pray it. And it seems (f) agreed, that by (f) Sup. c. 33. the ancient common law, clergy might be demanded upon f. 110, 111. the prisoner's first arraignment. And though afterwards for special reasons, the judges made it a rule not to admit any one to it till after he had pleaded; yet I find it no where holden in the old books, that a man could not legally de- mand it till called to judgment. Neither doth the (g) opi- (g) 1. Salk. 63. nion to the contrary, in the report of the case of *Armstrong Kelynge 103. v. Lisle*, grounded upon the authority of (b) *Scarl's Case*, (b) Hob. 289. seem to be at all made out by that case (+).

(+) See the case of the Widow Smith v. Taylor, Trinity Term, 11. Geo. 3. B.R. upon an appeal for the murder of her husband, where the decision in the case of *Armstrong v. Lisle* is confirmed as good law, and the reasoning of Mr. Serjeant Hawkins upon this subject approved of by Lord Mansfield, 5. Burr. 2801.

Sett. 15. But it seems clearly settled, that whenever the record on which a man is convicted of manslaughter, and admitted to his clergy, on an indictment or appeal of murder, is erroneous, either in respect of insufficiency (a) in the indictment or appeal, or for a (b) mis-trial, &c. so that his life was not in danger at the trial, &c. he cannot plead such conviction and clergy thereon had in bar of a second indictment or appeal.

(a) 4. Coke
39, 40, 47.
Crompt. 111.
(b) 6. Coke
14.

(c) 3. Inst.
131.

Sett. 16. It hath been adjudged, (c) that the conclusion of a plea of *autrefois convict* of manslaughter, and clergy thereon, &c. may be either, "*petit judicium si prædict*" A. B. "*iterum de eadem morte, de qua semel convictus est, respondere compelli debeat*;" or thus, (d) "*petit judicium si prædict*" A. B. *appellum suum prædict* *versus eum de morte prædict* "*habere seu manutenere debeat*."

(d) Coke's
Ent. 55.
3. Inst. 131.

(e) Crompt.
111.

Sett. 17. It is said (e) to have been adjudged in *Ho'croft's case*, that a verdict finding a man guilty of homicide *se defendendo* on an indictment of murder, may be pleaded to an appeal of the same death; but this was certainly not the very point (f) in question in that case; neither do I find it expressly taken notice of in any report of it.

(f) Co. Ent.
55.
4. Coke 45, 46.
3. Leonard
160, 161.
3. Institute
131.
1. And. 68.
(g) Sup. 1. 10.
(b) 3. Inst. 131.
Kelynge 104.

However, since it seems clear, that such a conviction would be a good bar of an appeal at the common (g) law, and since it is not within the letter of 3. Hen. 7. c. 1. which mentions only persons acquitted or attainted, it shall not be easily construed to be within the meaning of it, (h) being in this respect a penal statute, and derogatory from a maxim of the common law in favour of life.

(i) 1. And. 68.
4. Coke 46.
Sup. 1. 10.

And though it be in a great measure (i) agreed, that the statute in giving an appeal against a person attainted of murder doth by necessary consequence give it as well against one convict of murder, because every person attainted is convict and more; and if an appeal should not lie against a person convicted until he were attainted, it would be wholly in the power of the Court, by delaying to give judgment on a person convicted, to bar an appeal; yet since these reasons hold not in the case of one convict of *homicide se defendendo* only, it may well be argued, that a conviction thereof may still be a good bar of an appeal.

CHAPTER THE THIRTY-SEVENTH.

O F

P A R D O N.

BEFORE I proceed to consider in what manner A PARDON is to be taken advantage of, it may not be improper to premise some things concerning the nature of pardon in general.

As,

1. By whom a pardon is grantable.
2. Where it is grantable of right.
3. What is the nature of a Pardon of Grace.

As to THE FIRST POINT, viz. By whom a pardon is grantable.

Sec. 1. It seems, that anciently the right of pardoning offences within certain districts was claimed by the lords marchers and others, who had *jura regalia*, by ancient grants (a) from the crown, or by prescription. But it is enacted by 27. Hen. 8. c. 24. sect. 1. "That no person or persons, of what estate or degree soever they be, shall have power to pardon or remit any treasons or felonies whatsoever, nor any accessaries to the same, nor any outlawries for such offences, whether committed in England or Wales, or the marches of the same; but that the king shall have the whole and sole power and authority thereof united and knit to the imperial crown of this realm, as of good right and equity it appertaineth."

(a) See the statute of 27. H. 8. c. 24. Coke Litt. 114. Crompton 116. S. P. C. 104. 3. Inst. 233.

As to THE SECOND POINT, viz. Where a pardon is grantable of right (1), I shall endeavour to shew where it is to be so granted.

(1) Vide the case of Margaret Carolina Rudd, Cowper 331.

1. To persons found guilty of excusable homicide.

2. To robbers, clippers, burglars, &c. who shall discover two or more guilty of robbery, &c.

3. To an approver who hath convicted an appellee.

AND FIRST, as to persons found guilty of excusable homicide.

Seft. 2. It is enacted by the statute of Gloucester, c. 9.

"That in case it be found by the country, that a person

"tried for the death of a man, did it in his defence or by

"misfortune, then by the report (a) of the justices to

"the king, the king shall take him to his grace, if it

"please him." By which, at first sight, it seems to be

implied, that it is left to the discretion of the king, whether he will grant a pardon in such a case or not. And agreeably hereto it is said in four several notes (b) in *Fitz-*

herbert's Abridgment of cases in the time of Edward the third,

that a person found guilty of homicide *se defendendo* is to be

remitted to prison in order to attend the king's grace:

and yet in two other notes of (c) cases in the very same

year, it is said, that in such a case, if the prisoner cause the

record to come into the chancery, the chancellor will make

him a charter of pardon, without speaking to the king; and

this seems to be (d) settled at this day, and agreeable to the

ancient (e) common law, which shall not without express

words be restrained by a statute which seems to be made

in affirmance of it. And therefore these words in the

statute, "if it shall please the king," shall be taken as

spoken only out of reverence to him, and not as intended

to make the right of the subject to such a pardon pre-

carious. And the cases above cited, which seem to be

contrary, may be reconciled with the others, by intend-

ing them to mean only the grant of the king's pardon to

a person represented to him as guilty of homicide *se de-*

sendendo only, without any certificate of the verdict upon

record. For none of those cases make any mention of such

certificate, as the others do; and if there be no such cer-

tificate, it seems plain that the grant of a pardon is a mere

matter of favour.

(a) For the form of a certiorari in such a case, and a pardon thereon, see Reg. 190.

(b) F. Corone 284, 286, 287.

354. Alfo F. Co. 305. and 44.

E. 3. 44. Ab. F. Cor. 94. and 2. H. 4. 18.

Ab. B. Forf. 9. are to the same purpose.

(c) F. Corone 297. 361.

(d) S. P. C. 15, 16.

2. Inst. 316; 317.

Summary 250.

R. 1. c. 29. f. 24.

B. Ch. de Pard 65.

Keilway 108.

(e) Kelynge 122, 123.

Bract. l. 3. c. 17.

B. 1. c. 29.

sect. 19. to the end of the chapter.

However

However it seems to have been always (a) agreed, that the forfeiture of goods by such homicide may be saved by a pardon (which in this particular case seems to purge the offence *ab initio*). And it hath been (b) adjudged, that such a pardon is as necessary for one who is indicted only of homicide *se defendendo* and confesses it, as for one who is found guilty of homicide *se defendendo* on an indictment of murder. And if he were found guilty of having fled (c), &c. I question whether the pardon will save the forfeiture of the goods by reason of the flight; for that is grounded not on the homicide, but on the contempt of the law in not standing to its judgment.

(a) See the books cited to the other parts of this section, and 4. H. 7. 2. Ab. F. Cor. 61. B. Corone 138. or 139. B. Forfeit 42. 2. H. 4. 18. Ab. F. Cor. 69. B. Forfeit 9.

(b) Keilway 53. 4. H. 7. 2. Ab. F. Cor. 61. (c) Vide F. Cor. 286, 287. and infra, in the chapter of Falsifying Attainders.

SECONDLY, As to robbers, clippers and coiners, and burglars, &c. who shall discover two or more guilty of robbery, &c. A pardon offered to robbers.

SECT. 3. It is enacted by 4. and 5. Will. and Mary, c. 8. "That if any person or persons, being out of prison, shall commit any robbery, and afterwards discover two or more, who then had, or afterwards shall commit any robbery, so as two or more of the persons discovered shall be convicted of such robbery; any such discoverer shall himself have, and is hereby entitled to the gracious pardon of their majesties, their heirs, and successors, for all robberies which he or they shall have committed at any time or times before such discovery made, which pardon shall be likewise a good bar to any appeal brought for any such robbery."

SECT. 4. Also it is enacted by 6. and 7. Will. 3. c. 17. A pardon offered to clippers of the coin. "That if any person or persons, being out of prison, shall be guilty of clipping, coining, counterfeiting, washing, filing, or otherwise diminishing the coin of this realm, and afterwards discover two or more who then had, or afterwards shall commit any of the said crimes, so as two or more of the persons discovered shall be convicted of the same; any such discoverer shall himself have, and is hereby intitled to the gracious pardon of his majesty, his heirs, and successors, for all such his crimes, which he or they have committed at any time or times before such discovery made."

SECT. 5. Also it is enacted by 10. and 11. Will. 3. c. 23. (which excludes (d) all persons from their clergy who shall (d) Vide sup. by night or day, in any shop, ware-house, coach-house, or stable, privately and feloniously steal any goods, wares, or mer-

c. 33. s. 64, 65.

A pardon offered to burglars, house-breakers, horse-stealers, and shop-lifters.

merchandizes, being of the value of 5s. or more, although such shop, &c. be not actually broken open, and although no person be therein, or shall assist, hire, or command any person to commit such offence), "That if any person or persons shall commit any burglary, house-breaking, or felony, in stealing of any horse or horses, or any money, wares, or goods, from whom the benefit of clergy is by the said act taken away, and being out of prison, shall discover two or more, who then had, or after shall commit any such burglary, horse-stealing, or felony, as aforesaid, and shall be convicted thereof, or cause to be discovered and apprehended two or more, who shall be convicted as aforesaid; every such discoverer shall have, and is hereby intitled to his majesty's most gracious pardon for the burglaries, house-breakings, horse-stealings, or felonies as aforesaid, which he or she or they shall have committed at any time or times before such discovery made; which pardon shall be likewise a good bar to an appeal for any such burglary, &c."

Stat. 6. And it is further enacted by 5. Anne, c. 31. sect. 4. "That every person who shall be guilty of burglary, or of the (a) felonious breaking and entering any house in the day-time, and after shall discover two who shall have committed such burglary or felony, so as they be convicted, &c. shall have 40l. &c. and be entitled to a pardon of all burglaries and felonies, except murder and treason; which pardon shall be a bar to an appeal, &c."

(n) Vide c. 33
sect. 85 to sect.
106.

A pardon offered to smugglers.

By 25. Geo. 3. c. 57. Accomplices discovering an offender in counterfeiting LOTTERY ORDERS, &c. are entitled to a pardon.

† It is enacted by 8. Geo. 1. c. 18. s. 7. "That if any runner of foreign goods shall within two months after his offence, and before his conviction, discover two or more of his accomplices therein to the commissioners of the customs or excise in *England* or *Scotland*. so as they or two of them at least be convicted of such offence (as described in the act), the offender or offenders so discovering shall receive the sum of forty pounds for every such offender so discovered and convicted, so as the value of the goods recovered by such discovery shall exceed fifty pounds; and such person so discovering shall be clearly acquitted and discharged of such his or her offence." And the like is enacted by 9. Geo. 2. c. 35. upon the same subject.

PERSONS to whom the king has, by special proclamation in the Gazette, or otherwise, promised his pardon, are also entitled to it of legal right. Cowper 333.

Sett.

Señ. 7. **THIRDLY**, In what manner an approver who convicts the appellee is intitled to a pardon. This hath been shewn Chapter 24, section 27.

(1) Great inconvenience arose from the practice of approvement. A mode has therefore been adopted in analogy to that law, by which an accomplice may be entitled to a recommendation to the king's mercy, but not to a pardon as of legal right, which he may plead in bar, or avail himself of on his trial. It is where an accomplice, having made a full and fair confession of the whole truth, is in consequence thereof admitted evidence for the crown, and that evidence is afterwards made use of to convict the other offenders. If he act fairly and openly, and discover the whole truth, though he is not entitled of right to a pardon, yet the usage, the practice, and the lenity of the Court is to stop the prosecution against him; and he has an equitable title to a recommendation for the king's mercy.—It holds out a kind of hope, that accomplices who behave fairly, and disclose the whole truth, and bring others to justice, should themselves escape punishment and be pardoned.

(2) But a justice of the peace cannot pardon the offender, and tell him he shall be a witness against others. He cannot select whom he pleases to pardon or prosecute, and the prosecutor has even a less pretence to select than the justice of peace. However, although the justices deceive the accomplice under a promise, or assurance, or hope of pardon from them, which in strictness they had no right to make, yet if he make a full and fair disclosure, at the time of his examination, of all he knows, he will be intitled to a recommendation to mercy, and the king's bench will in this case bail him in order that he may apply for the king's pardon. Or the justices of gaol-delivery, on all the circumstances relative to the prisoner's claim of indemnity being laid before them, will exercise their discretion in deferring the trial accordingly. Lord Mansfield, Cowper 331.

As to **THE THIRD POINT**, *viz.* What is the nature of Pardon of a pardon of grace. I shall consider the following particulars :

1. Where a pardon of grace is good in law.
2. What is the effect of a pardon of grace.
3. Whether it may be waived.

As to **THE FIRST POINT**, *viz.* Where such a pardon is good in law; I shall consider,

1. What is required to make a good pardon of felony in general.

The several points in which it is considered.

2. What is particularly required in a pardon of treason, murder, or rape.

3. How far the pardon of one man may discharge another.

4. How far it is necessary that the pardon of several persons for felony be several.

5. Whe-

5. Whether the king's grant of a protection, or of a place of trust to a traitor or felon, carry with it an implied pardon of his crime.

6. What is required to make a good pardon of offences not capital.

7. Whether any offence can be pardoned before it is committed.

8. Whether there be any offence which cannot be pardoned after it is committed.

9. How far a pardon may be of force against the private interest of the subject.

10. Whether it may be conditional.

11. Where a pardon is void in respect of a wrong recital.

As to the first particular, *viz.* What is required to make a good pardon of felony in general.

Sec. 8. It seems to be laid down as a general rule in many books, that wherever it may be reasonably intended that the king, when he granted such pardon, was not fully apprised both of the heinousness of the crime, and also how far the party stands convicted thereof upon record, the pardon is void, as being gained by imposition upon the king. And this is very agreeable to the reason of the law, which seems to have intrusted the king with this high prerogative, upon a special confidence that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wit of man cannot possibly make so perfect as to suit every particular case. And upon this ground it hath been holden, (*b*) that if one be indicted by these words, "that he had slain a man for having sued him in the king's court," and the king make him a charter of all manner of felonies; this charter shall not be allowed, because it shall be intended that the king was not acquainted with the heinousness of the crime, but deceived in his grant. Also where one outlawed in an appeal of felony prayed his clergy, which was counterpleaded on the account of bigamy, &c. and afterwards purchased a pardon, and sued a *scire facias* against the appellant, &c. it is (*c*) said, that the pardon was not allowed, because it made no mention of the bigamy.

(*a*) 8 H. 6. 20. Ab. B. Char. of Pardon 19. 8 H. 6. 21. Ab. B. Patents 15. 6. Coke 13. 3. Inst. 238.

(*b*) 8 H. 6. 20. but note, that Brook in abridging this case in the title of Charter of Pardon 15. omits the words, "because he sued him in the king's court."

(*c*) F. Charter 16.

S. P. C. 102. Crompton 115. from the authority of the Year-Book of 11. H. 4. 17. pl. 24. and 48. pl. 23. whereon the debate of this case it seems admitted, that the Pardon was not good because it made no mention of the bigamy; and yet it is said that upon the non-appearance of any one to maintain the appeal, the Pardon was afterwards allowed. *Ergo quare.*

Also it seems agreed by all the (a) books, that if a man be attainted of any felony, whether by abjuration, or outlawry, or otherwise, and afterwards get a pardon which doth not expressly mention the attainder, the pardon will not avail him, (b) because it shall be intended that the king had not confluence of the attainder, but was deceived in his grant, which shall not grieve him when he has true notice of the matter.

Ab. F. Corone 155. Same point admitted, 36. H. 6. 25, 26. Ab. B. Charter 25. 6. Coke 13. F. Corone 124. Crompton 115. 3. Infl. 238. Summary 251. S. P. C. 102. 123. Dalton c. 94. Kelynge 28. (b) These are the very words of 8. H. 6. 21. Ab. B. Patent 15.

And upon the like ground it hath been holden (c), (c) 1. Sid. 366. that the pardon of one who is convicted, by verdict, of a felony is not good, unless it recite the indictment and conviction.

Also it hath been (d) questioned, whether the pardon of one who is barely indicted of felony be good, if it do not mention the indictment. But this hath been (e) adjudged to be helped by the words "*five indictatus five non.*"

See 9. It hath been holden, that anciently (f) a pardon of "all felonies" included all treasons, as well as all felonies whatsoever, and might be pleaded to an indictment for them.

S. P. C. 2. 102. F. Charter 13. Dyer 124. March 214, &c.

And it seems to be taken for granted, in many (g) books, that a pardon of all felonies in general, without describing any one particular felony, may even at this day, if the party be neither (b) attainted nor indicted, be pleaded in bar of any felony whatsoever, coming within the general limitations of the pardon, except murder or rape; and that the only (i) reason why it cannot be also pleaded to murder or rape, is, because the statute of 13. Rich. 2. set forth more at large under the next point, requires an express mention of them. But I find this point no (k) where solemnly debated. Neither doth it seem easy to reconcile it with the general rules concerning pardons, agreed to be good in other cases; for if a felony cannot be well (l) pardoned where it may be reasonably intended that the king, when he granted the pardon, was not fully apprised of the state of the case,

10. Edw. 4. 10. 36. H. 6. 25. 26. Sum. 251. 2. Jones 56. 6. Edw. 4. 4. B. Charter F. Pardon 19. (i) Keilway 91. 9. Edw. 4. 26. Crompton 115. (k) 2. Keilway 415, 574. (l) See the precedent section.

much less doth it seem reasonable that it should be pardoned where it may be well intended that he was not apprised of it at all. And if a felony whereof a person be attainted cannot be well pardoned, even though it appear that the king was informed of all the circumstances of the fact, unless it also appear that he was informed of the attainder; much less doth it seem reasonable that a felony should be well pardoned, where it doth ~~not~~ appear that he knew any thing of it: for by this means, where the king in truth intends only to pardon one felony, which may be very proper for his mercy, he may by consequence pardon the greatest number of the most heinous crimes, the least of which, had he been apprised of it, he would not have pardoned. And for these reasons, as I suppose, general pardons are commonly made by act of parliament; and have been of late years (a) very rarely granted by the crown, without a particular description of the offence intended to be pardoned. As to the (b) precedents of such general pardons in *Rastal's Entries*, it may be answered, that their authority seems to be of less weight when compared with those many precedents of pardons in *the Register* (c), every one of which particularly describes the offence which is pardoned, and even those which relate to (d) homicide by lunaticks, or infants, or in self-defence, &c. except only one which pardons escapes, but expressly excepts all voluntary ones. And therefore where the books speak of pardons of all felonies in general as good, perhaps it may be reasonable for the most part to intend that they either speak of a pardon by parliament, or that they suppose (e) that the particular crime is mentioned in the pardon, though they do not express it.

(a) Vide 2.

Reb. 575.

(b) Rastal

455. 459.

(c) Register

of original
writs f. 308 to
313.

(d) Register of
original writs
309.

(e) Dyer 124.

Vide 22. Aff.

47.

Ab. F. Char-
ter 14.

Stat. 10. By 27. Edw. 3. c. 2. it is enacted, "That in every charter of pardon of felony which shall be granted at any man's suggestion, the said suggestion and the name of him that makes it shall be comprised; and if after the same suggestion be found untrue, the charter shall be disallowed. And the justices before whom such charters shall be alledged, shall enquire of the same (f) suggestion, and if they find it untrue, shall disallow the charters so alledged."

(f) Vide

Raym. 13.

22. Siderfin 41.

And by 5. Hen. 4. c. 2. it is enacted, "That if an approver become a felon again after a pardon, he who procured the pardon shall forfeit 100l."

Stat. 11. It is certain that a general pardon of felonies extends not to piracy, as hath been more fully shewn Book 1. ch. 37. sect. 6.

Stat. 12. It seems a settled rule, that no pardon of felony shall be carried farther than the express purport of it; and there-

therefore where a man was attainted on an appeal of robbery, and the king, reciting the attainder, pardoned the execution, it is said, (a) that because the pardon did not expressly mention the felony, it was disallowed: but it does not appear how it was pleaded, nor to what purpose it was attempted to be made use of, nor how far, or in what respect it was disallowed; and therefore, though (b) some books seem to hold generally, on the authority of this case, that such a pardon is no way good, I do not well see how any more can be proved from it than this, that it shall neither amount to a pardon of the felony itself, nor of any other consequence of the attainder besides the execution. But it seems difficult to give a reason why it should not well pardon the execution, since the king doth not appear to have been any way deceived; and (c) it hath been clearly adjudged, that the king may, if he think fit, pardon the execution, and no more.

(a) 8. H. 4.
21.
Ab. F. Chart.
26.
B. App. 27.
Chart. de
Par. 13.
B. Corone 24.
6. Coke 13.
S. P. C. 102.
(b) Crompton
115.
Summary 251.
(c) 6. H. 4. 6.
Ab. F. Cor. 227.
See the chapter
of Execution
and Reprieve.
1. Stat. Tr. 261.

Sec. 13. It seems (d) agreed, that where a general act of pardon excepts some particular kinds of felony, such exception extends as well to those whereof any persons are attainted as others; for if those whose guilt appears not on record are excepted, much greater reason is there that those whose guilt appears in so high a manner should be excepted; and therefore being within the letter of the exception, they cannot but be intended to be within the meaning of it also. Neither doth it follow, that because the pardon of a felony whereof a person is attainted is not (e) good without mentioning the attainder, therefore such a general exception of "all felonies" shall not extend to those whereon there hath been an attainder; for the case of such a pardon depends on this special reason, that the king ought to be fully apprised of the proceedings against the party before he pardons him, as hath been more fully shewn section the eighth.

(d) 6. Coke 13.
Summary 251.
3. Inst. 238.

(e) Vide sup.
sect 8, 9.

As to the second particular, viz. What is particularly required in a pardon of treason, murder, or rape.

Sec. 14. I do not (f) find that the common law required any thing particular in the form of pardons of such crimes, which was not equally requisite in the pardon of any felony whatever. But it being enacted by the statute of 2. Edw. 3. c. 2. which is confirmed by several (g) subsequent statutes, "that charters of pardon of manslaughters shall not be granted, but only where the king may do it by his oath, that is to say, where a man slayeth another in his own defence, or by misfortune;" and there being no precedent in the Register (h) of a pardon of any

(f) Sup. sect.
9.
Moor 752.
3. Modern
37, 38.
F. Chart. 13.
F. Corone
25.
Keilway 92.
(g) 4. Ed. 3.
c. 12.
10. Ed. 3. 4.
(h) Reg. 306.

14. Ed. 3. c. 14. (i) Reg. 306.

other homicide but such as is done either in self-defence or by misadventure, or by infants or madmen; (a) some have gone so far as to hold, that the king's pardon of any other homicide is not good, unless it be confirmed by parliament, or at least have a *non obstante* of these statutes. But this seems contrary not only to the general tenour of the books, which clearly (b) admit the king's power to pardon any homicide in general, but also to the express purport of 13. Rich. 1. which by shewing in what form the king shall make a pardon of murder, plainly allows that he has a power to make it. Besides, the same reasons hold as strongly against the king's power to pardon manslaughter as murder, which yet I never knew disputed. However, it seems reasonable that thus much at least be allowed to follow from the arguments above-mentioned, that too great caution cannot well be (c) taken in the grant of pardons of any homicide; that there be some such favourable circumstances in extenuation of it, as may bring it some way within the equity of the cases in *the Register*, and those old statutes.

Duer 34. In all which books it is clearly admitted, that an outlawry in an appeal of death may be pardoned by the king so far as the public justice is concerned in it. See also *Shower* 283, 284. 2. *Jones* 56. *Kely.* 24, 25. 1. *Sider.* 366. *Moor* 752. *Ravm.* 13. 2. *Keb.* 363. 415. 574. 3. *Keb.* 30. 694. 3. *Mod.* 37. (c) See *Bracton* 133. See *Rex v. Parsons*, *Salk.* 499.

Sec. 15. It is recited by the statute of 13. Rich. 2. c. 1. "That the commons had grievously complained of the outrageous mischiefs which had happened to the realm, for that treasons, murders, and rapes had been commonly done, and the more because charters of pardon had been easily granted in such cases, and that hereupon the commons had requested the king that such charters might not be granted; to which the king had answered, that he would save his liberty and regality, as his progenitors had done;" and thereupon it is enacted, "That no charter of pardon shall from henceforth be allowed before any justice for murder, or for the death of a man slain by await, assault, or malice prepensed, treason, or rape of a woman, unless the same murder, death of a man slain by await, assault, or malice prepensed, treason, or rape of a woman, be specified in the same charter. And if the charter of the death of a man be alledged before any justices, in which charter it is not specified that he of whose death any such is arraigned, was murdered or slain by await, assault, or malice prepensed, the same justices shall enquire by a good inquest, of the *vi/ve* where the dead was slain, if he were murdered or slain by await, assault, or malice prepensed; and if they find that he was murdered, or slain, by await, assault, or malice prepensed, the charter shall be disallowed, and further it shall be done as the law alloweth."

Sec. 16. Also the said statute required, that the name of him who sued for such a charter should be endorsed upon the bill under a great penalty, &c. But to this, and all other matters, except only what is contained in the precedent section, it is repealed by 16. Rich. 2. c. 6.

Sec. 17. It so fully appears from the express words of 13. Rich. 2. that the king's pardon of murder, rape, or treason, cannot be good, without a clause of *non obstante*, unless the crime be specified in the pardon, that I do not (a) know that it hath ever been disputed. But it hath been often formerly (b) adjudged, that a murder might be well pardoned under the general description of a felonious killing; if the charter had the clause of *non obstante* of this statute; which construction seems in a great measure to evade so excellent a law, by barely changing the form of the charter. But it seems difficult to give a good reason why this statute should so easily be evaded, which was made for the prevention of such great mischiefs, and no ways tends to abolish the king's prerogative, but only to put such a restraint upon the abuse of it, which every one must own to be reasonable. But if such opinions were founded on the king's power of dispensing with statutes, they seem to have been of (c) little force since the statute of 1. Will. and Mary, sess. 2. c. 2. by which it is declared and enacted, "That from and after that session, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, &c."

all treasons, &c. but I suppose that the particular treason was also expressly pardoned for it appears that the attender for it was expressly mentioned. (d) 2. Keble 163. 174. Shower 283. 284. Skinner 157. 1. Salk. 366. 3. Mod. 37. 38. Kelynge 24. 25. Moor 752. 12. Coke 18. 2. Jones 56. Rastal 455. The same point is admitted and complained of, S. P. C. 132. Summary 230. Vide 3. Inst. 136. 2. H. 7. 6. n. March 214. Styles, Richabee's case. (e) Shower 283, 284.

Sec. 18. But it seems plain, that pardons of manslaughter, or any other felony, except murder or rape, remain as they were at common law, for which I shall refer to section 8, 9, 10, 11, 12, 13. from whence it follows, that the pardon of the (d) felonious killing of J. S. may be well pleaded to an indictment of manslaughter for killing him. But where such a pardon hath been pleaded to an indictment of manslaughter by the coroner's inquest, the Court in prudence hath refused (e) to allow it till the fact had been found manslaughter only, by a jury directed by a higher court.

(d) Dyer 50.

115.

6. Coke 13.

Crompton

113.

Señ. 19. It hath been (a) adjudged, that where a general act of pardon expressly pardons "all petit treasons," but excepts murder; it cannot be avoided by indicting one for murder only, without the word *proditorie*, &c. who has been guilty of petit treason; for the less offence being included, and consequently drowned in the greater, cannot but be pardoned by a pardon of it; and therefore the exception of murder in such a pardon must be construed of such murder only as is specially so called, and doth not amount to petit treason.

(b) 1. Levinz

8. 120.

1. Sider. 150.

1. Keb. 66.

348.

Señ. 20. Also it hath been (b) adjudged, that a general act of pardon of "all felonies, &c. except murder," shall extend to a *felo de se*; for notwithstanding his offence may in strictness be called murder, and consequently may seem naturally enough to come within the exception, yet since the general words of an act of parliament are to be expounded according to the common use of them, and the offence of *felo de se* and murder are generally understood as distinct offences, and such as are distinctly treated by all authors, who when they use the word "murder" as signifying a certain species of offences, always meant by it the murder of another; and farther, since there is greater reason to except the murder of another out of a pardon than that of a man's self, because both the law of God and nature seem generally to require blood for blood, which can be applied only to the murder of another, the word murder shall in such an exception be taken only to signify the murder of another.

(c) Cole's

case, Plow-

den 401.

1. Hale 426.

Crompton

116.

This is made

a *quære*,

Dyer 99. and

see the case of Will. Nichols, Foster 64 to 68. where Cole's case is said to be good law, but not to warrant the rule here contended for.

Señ. 21. Also it hath been (c) adjudged, that if a general act of pardon extend to all felonies, offences, injuries, misdemeanors, and other things done before such a day, it pardons a homicide from a wound given before the day, whereof the party died not till after the day, because the stroke which is the cause of the death being pardoned, all the effects of it are consequently pardoned.

As to the third particular, *viz.* How far the pardon of one man may discharge another.

(d) Sup. c. 29.

100. 21.

24. H. 6. 9.

23. Affize 16.

112. 30. 31.

Señ. 22. It seems to be generally (d) agreed, that notwithstanding all felonies are (e), several, and consequently

B. Chart. of Pardon 31. Corone 122. or 123. F. Charter 15. (e) Cro. 22. E. 4. 7. *Infra* sect. 25. Dyer 34.

a par-

a pardon of one man cannot be a direct discharge of another, yet in some cases the felony of one man may be so far dependant upon that of another, that the pardon of the one will by a necessary consequence enure to the benefit of the other. As where the principal pleaded his (a) pardon, and was allowed it at the common law, (b) before his attainder, or where he pleads and is allowed it at this day before his (c) conviction, in which case it seems that the accessary may by a necessary consequence take benefit of it, because he cannot be arraigned till after the principal is convicted.

(a) F. N. B. 115.
7. H. 4. 16.
Sup. c. 29.
sect. 41.
(b) Sup. c. 29.
sect. 41, 42.
(c) Sup. c. 29.
sect. 43.

SECT. 23. It is (d) agreed, that if a man be bound to the king as surety for another, for the payment of a certain fine or other debt due to the crown, the pardon of the principal is a discharge of the surety also. But it seems to have been (e) holden as a general rule, that where a man is bound a surety for another for the performance of a future act, the discharge of the principal before the time of the performance will not discharge the surety, because nothing was due to the king at the time of such discharge. But this seems extremely nice: neither do the cases (f) brought for the proof of it seem any way to come up to it. For as to the first of them, viz. that of the king's release of a recognizance for the peace to the principal, before it is forfeited, which shall not discharge the sureties; it may be answered, that it will (g) not so much as discharge the principal. And as to the other case (h) cited for this purpose, viz. that of the king's pardoning J. N. the building of such a house, for his building whereof J. S. is bound to the king, which shall be no discharge to J. S.; it may be answered, that as this case is put, J. N. doth not seem to be bound at all, but only J. S. who therefore doth not seem to come under the notion of a surety but of a principal.

(d) 1. H. 7. 10.
F. Pardon 2.
B. Chart. of
Pardon 36.

(e) See the book next above cited.

(f) See the book next above cited.

(g) See Bk. 1. c. 69 sect. 27.
(h) 1. H. 7. 12.

As to the fourth particular, viz. How far it is necessary that the pardon of several persons for felony be several.

SECT. 24. It seems (i) agreed, that the pardon of A. B. and C. of all felonies by them done, without adding, or any of them, is void; because it supposes them jointly guilty, and extends to no other but joint felonies, whereas all felony is several (k) in each offender, and cannot be joint. And THE YEAR-BOOK of (l) 22. Edw. 4. goes so far as to hold, that the addition of the words, or any of them, will not help a pardon beginning with such joint words,

(i) 22. E. 4.
B. Char. of
Par. 51.
Dyer 34.
S. P. C. 103.

(k) Sup. c. 23.
(l) 22. E. 4. 7.

(a) B. Char. words. But this is (a) said to be misreported, and contrary to the roll, and seems to be agreed (b) not to be law at this day.
 of Pardon 51.
 Dyer 34.
 S. P. C. 102.
 (b) Dyer 34. Summary 252.

As to the fifth particular, viz. Whether the king's grant of a protection, or of a place of trust to a traitor or felon, carry with it an implied pardon of his crime.

(c) S. P. C. 102.
 Co. L. 130.
 7. Ed. 4. 29.
 Ab. F. Cor. ne 30.
 3. Inst. 239.
 249.
 2. R. Abr. 123.
 F. Corone 61.
 But F. Corone 122. seems contrary.
 (d) F. Cor. 239. cited.
 3. Inst. 239.
 240.
 S. P. C. 140.
 2. Roll. 50.
 (e) 3. Inst. 240.
 (f) S. P. C. 102.
 3. Inst. 239.
 240.
 2. Roll. 50. (g) Sup. section 12, &c.

(b) C. Jac. 494.
 2. Roll. 50.
 1. State Trials 187, 188, 877.
 (i) Sup. sect. 15.
 (k) Sup. sect. 8, 9.
 (l) Sup. sect. 8, 9.

However, it was solemnly adjudged (b) in *Sir Walter Raleigh's Case*, that the king's grant of a military command to a person attainted of high treason, wherein he called him his true and loyal subject, and gave him judicial power over the lives of others, did not pardon the high treason, because every pardon of high treason requires an express mention of it, if not by the common law, yet at least by the statute of 13. (i) Rich. 2. Besides, if the offence had been but felony, yet after an attainder it could not have been pardoned without an express mention both of the (k) felony, and also of the (l) attainder.

As to the sixth particular, viz. What is required to make a good pardon of offences not capital.

Sec. 26. It hath been adjudged, that a pardon of "all misprisions, trespasses, offences and contempts," will pardon a con-

a contempt in making a (a) false return, &c. and a (b) striking in *Westminster-hall*, and (c) barratry, and even a (d) *præmunire*: And it hath been laid down as a (e) general rule, that it will pardon any crime which is not capital. But it is said (f) to have been holden, that such a pardon will not extend to simony, because it is *malum in se*; but this seems to be no good reason; for barratry, and the injurious striking of another, and generally all offences at common law, are also *mala in se*; and yet it seems clear, that unless they be capital, they may be pardoned by such a pardon.

dern 102. (d) Cro. Jac. 306. 2. Bulst. 299. (e) 1. Mod. 102. 198. F. Corone 122. (f) Watson's Clergyman's Law, c. 5. 1 Siderfin 170. 222. The same case is in Keble 780; but this point is not taken notice of. And the contrary seems to be admitted Cro. Eliz. 685. Moor 916. and is agreed 2. Modern 52.

SECT. 27. It hath been questioned (g), whether a general pardon of all trespasses extends to champerty or confederacy.

As to the seventh particular, *viz.* Whether any offence can be pardoned before it is committed.

SECT. 28. It seems agreed, (h) that the king can by no previous licence, pardon, or dispensation whatsoever, make an offence punishable which is (i) *malum in se*, *ID EST*, unlawful in itself, as being against the law of nature, or so far against the public good as to be indictable at common law. For a grant of this kind tending to encourage the doing of evil, which it is the chief end of government to prevent, is plainly against reason and the common good, and therefore void.

(i) But chief justice Vaughan, in Sorrel's case, f. 332, &c. seems to find fault with the distinction between *malum in se et prohibitum*, as not fully answering all the cases concerning dispensations.

Yet it seems to have been adjudged, (k), that the king's grant to the *bishop of Salisbury*, and his successors, having the custody of a prison, that they shall be quit from all escapes, &c. having been allowed *in eyre*, shall be a good discharge from any fine for a negligent escape out of such prison. And yet it is admitted that such a grant is no discharge of a voluntary escape; but it is said, that it shall discharge a negligent one, because it is punishable only by pecuniary penalty; and it is a general rule, that the king may discharge a (l) possibility of an interest before it happens; as where the tenants of his manor are to be amerced for a default in respect of their tenures, which the king may pardon beforehand. But if it be a good rule, that

the

the king cannot pardon an offence which is *malum in se* before it happens, and the negligent keeping of a prison be such an offence, which I think cannot be denied; and farther, if it be also a good rule, that where the king's grant is plainly against the common good, as a grant of this kind seems to be, as tending to make a gaoler less diligent in his duty, by taking off the legal punishment of his negligence, I do not well see how this case can be maintained. For it seems by no means to follow, that because the king can discharge his right to an amercement before it happens, for a default of his tenants in a matter relating barely to the revenue of the crown, which it is admitted that in the like case any other lord may do as well, therefore he can discharge a pecuniary penalty for an offence of a public nature before it happens. Neither doth it seem, that a negligent escape is only punishable by a pecuniary penalty; for in some (a) books it is said to be finable, by which it is implied that the offender may be imprisoned. Besides it seems (b) agreed, that many negligent escapes will forfeit the office of keeping a gaol, and therefore it is plain that a pecuniary penalty cannot be said to be their only punishment. However, this is the only case I (c) meet with which looks like an exception out of the general rule, that the king cannot pardon an offence that is *malum in se* before it happens.

(a) Sup. c. 19.
f. 31.
(b) Sup. c.
29. f. 29.
30.
(c) But chief
justice Vaug-
han, in Sor-
rel's case, 335,
336, seems to
argue to the
contrary.

Davis 75. Sect. 29. But where (d) a thing, which is lawful in its own nature, is made unlawful by the prohibition of an act of parliament only, as the carrying (e) bell-metal or (f) beer, &c. out of the realm, importing (g) certain merchandises in foreign ships, &c. selling (h) wines beyond a certain price, (i) exporting wool to another place than Calais, selling (k) wines without a licence, multiplying (l) gold or silver, (m) coining money of a base alloy, and (n) other matters of the like nature, it seems to have been formerly taken (o) for granted, that generally the king might dispense with it as to a (p) particular time, or place, or person, or even a (q) corporation aggregate, &c. so far as the publick was concerned in it. Yet where such dispensation could not but be attended with a great inconvenience, as the introducing a monopoly, or frustrating the end for which the law was made, as the licensing (r) a particular person to import foreign cards or

Finch 234.
235.
(e) Dyer 52.
(f) Dyer 92.
(g) Dyer 54.
(h) Dyer 270.
(i) 2. Rich.
2. 12. 14.
11. H. 7. 11, 12.
37. H. 6. 4.
2. H. 7. 6.
B. Chart. de
Pardon 24. 76.
Parliament 98.
14. H. 7. 8.
F. Chart. 21.
7. Grant 33.
(d) Vaugh.
330.
1. Levinz 217.
1. Siderfin 6, 7. (n) Vaugh. 344. (m) 11. H. 7. 11. Vaughan 344. (n) 2. Rich.
3. 12. 2. H. 7. 6. 12. H. 3. by Martyn. Dyer 224, 225, 303. (o) See the books
above cited to the other parts of this section, and 3. State Trials 799 to 810. and 845.
(p) 17. Coke 88. 7. Coke 36. 1. Levinz 218. Co. Lit. 99. Vide 3. Levinz 389.
(q) Vaughan 852. 1. Levinz 217. (r) Vaughan 344. 11. Coke 88. See the books
above cited.

wines

wines prohibited by parliament, and (a) *a fortiori*, if it (a) 3. State
tended to suspend the whole statute in general, it was com- Trials 793.
monly agreed to be void. 796. 802, 809.

Also, wherever an act of parliament gives a particular in- (b) Sup. c. 26.
terest, or right of action, to the party (b) grieved by the feft. 64.
breach of it, as the statutes of (c) mortmain, which give 37. H. 6. 4.
an entry to the next immediate lord for an alienation to 2. Rich. 3. 12.
a corporation, the (d) statutes against maintenance, forcible Vaughan 342.
entries, carrying distresses out of the hundred, (e) suffering 343.
one in execution to escape, &c. which give an action to the Infra feft.
party grieved by the offence prohibited; it seems to have 34.
been always agreed, that no charter by the king can be of (f) 11. Coke
any force to bar the right of the party grounded upon such 98, 99.
statute, because it is a settled rule, that the king cannot pre- Vide Keil-
judice the interest of the party. way 134.
But new by
7. and 8. Will.
3. 37. such

licence may be granted by the king alone. (d) Vaughan 342, 343. (e) Dyer
162. 297.

Also, where a statute is express, that the king's charter
against the purport of it, whether with or without a clause
of *non obstante*, shall be void; it is said by Sir (f) Edward (f) 12. Coke
Coke, "and no clause of *non obstante* can dispense with it, un- 18, 19.
less it tend to restrain some prerogative solely and in-
separably incident to the person of the king;" as the right
of pardoning, or of commanding the service of the subject
for the public weal; which being (g), as he seems to argue, (g) 7. Coke
founded on the law of nature, are so far inseparable from Calvin's case,
the king, that by a clause of *non obstante* he may dispense 14.
with any statute whatsoever which tends to deprive him (b) 2. H. 7. 6.
of them. And on this ground the resolution of the judges Ab. F. Grant
in THE (b) YEAR-BOOK of *Henry the seventh*, is said to be main- 33.
tainable, whereby it was adjudged, without any difficulty, that B. Par. 102.
where the statute of 23. Hen. 6. c. 8. expressly enacts, that Vide Finch
patents to sheriffs to continue longer than a year shall be 234, 235.
void, and the party disabled to bear the office of sheriff 13. H. 7. 8.
notwithstanding any clause of *non obstante*, yet the king by Plowden 503.
the clause of *non obstante* might make a good patent of such
office for life. Which is in effect to say, that let there be
never so good reasons for the making a new law for the
restraint of the prerogative in any particular relating to the
service of the subject, yet it is not in the power of the Legis-
lature to make such a law; and yet no one will deny that
wherever the law of nature leaves a matter indifferent, there
the law of man ought to prevail. Neither is there any
pretence to say, that the king has a right by the law of
nature to appoint sheriffs, since it is plain that before the
(i) statute of 9. Edw. 2. the freeholders chose them, un- (i) 2. Inst. 558,
less 559.

less they had a fee in their office. And what reason can there be, that the statute-law, which gives the crown the power of making sheriffs, may not also qualify that power as shall be thought convenient? But it is observable, that the resolution abovementioned does not go upon any particular reason which may distinguish the case of a sheriff from any other case, but only on the king's power by *non obstante* to dispense with the statutes concerning the transporting wool, the pardoning of murder, and the expressing the quantities of the land granted by the king's patents, and such like; which because they may be dispensed with by clauses of *non obstante*, it is taken for granted, that the statute of 23. Hen. 6. might as well be dispensed with by them; as if it were a plain consequence, that because statutes which say nothing concerning the clause of *non obstante*, may be dispensed with by it; therefore the statute which expressly provides against it, may also as well be dispensed with by it.

(a) Co. Litt.

99.

Plowden 502.

Dyer 269.

where the grant is made.

ex certa scientia. Con. by

Dyer in Plow-

den 502.

Vide Rastal

302.

F. Grant 36.

Ent. Conge. 28.

Plowden 334.

(b) Finch 234, 235.

Plowden 502.

(c) 2. H. 7. 6.

Ab. B. Pat. 109.

F. Chart. 33.

2. Rich. 3. 12.

43. Assize 19.

Dyer 52. 54.

29. 270. 303. 352.

See Har-

grave's Co.

Lit. 120,

no. 11.

Sec. 30. It is (a) said, that the king may dispense with the statutes of mortmain, without any clause of *non obstante*; and this seems very reasonable, because thereby he only gives up that right of entry which those statutes give him for the forfeiture, which every mesne lord might also do as well so far as he had a right by those statutes. Also it seems to be holden (b) by some books, that the clause of *non obstante* was only requisite in respect of such statutes which expressly said it should be void. But the far greater number of (c) authorities seem to be to the contrary.

Sec. 31. But the dispensing power was carried so very high in a late reign, and found to be of such dangerous consequence, as to make the execution of the most necessary laws in effect precarious, and merely dependant on the pleasure of the prince. And it seeming highly incongruous that the king should have a kind of absolute and unlimited power in dispensing with laws wherein the Church and State have the highest interest, when at the same time he has no power at all to dispense with any law which vests the least right or interest in a private subject, it was found by experience necessary to declare and enact by 1. Will. and Mary, sess. 2. c. 2. "That no dispensation by *non obstante* of or to any statute, or any part thereof, be allowed, but that the same shall be held void and of none effect, except a dispensation be allowed in such

"sta-

“ statute. But it is provided, that no charter, grant, or
 “ pardon, granted before the 23d of October 1689, shall be
 “ any way impeached or invalidated by that act, but that
 “ the same shall be and remain of the same force and ef-
 “ fect in law, and no other, as if the said act had never
 “ been made.”

Señ. 32. It hath been always (a) agreed, that the king (a) *Finch 235.*
 never could dispense with a statute before it was made. *1. Siderfin 6.*
Dyer 52.

As to the eighth particular, viz. Whether there be any
 offence which cannot be pardoned after it is committed.

Señ. 33. I take it to be a settled rule, (b) that the king (b) *See the*
 may pardon any offence whatever, whether against the books cited
 common or statute law, so far as the publick is concerned to the other,
 in it, after it is over, and consequently (c) may prevent any parts of this
 popular action on a penal statute by a pardon of the offence and the next
 before any suit commenced by an informer. But while a section.
 public nuisance continues unreformed, it seems (d) agreed, (c) *Sup. c.*
 that the king cannot wholly pardon it, because such pardon 26. sect. 64.
 would take away the only means of compelling a redress *Infra sect. 34.*
 of it. But it hath been (e) holden by some, that a pardon (d) *3. Inst.*
 of such offence will save the party from any fine for the 237.
 time precedent to the pardon. *Vaughan 333.*
37. H. 6. 4.
Plowden 487.
Vide F. Alfize

445. *Keilway 134.* 22. *Coke 29, 30.* 1. *State Trials 578.* (e) 12. *Coke 30.*

As to the ninth particular, viz. How far a pardon may
 be of force against the private interest of the subject.

Señ. 34. I take it to be a (f) settled rule, that the king (f) *Sup. f. 29.*
 cannot by any dispensation, release, pardon or grant what- *8. H. 6. 19.*
 soever, bar any right, whether of entry, or action, or any *Ab. F. Grant*
 legal interest, benefit, or advantage whatsoever before vested 4.
 in the subject; and upon this ground it seems clear, that *37. H. 6. 4.*
 the king can no way bar any action on a statute by the *Ab. B. Char.*
 party (g) grieved; nor even a popular (h) action by a com- *de Pardon 24.*
 mon informer, if commenced before his pardon or release; *2. Rich. 3. 12.*
 and that he cannot discharge a recognizance (i) for the *Plowden 487.*
 peace before it is forfeited. *F. Alfize 445.*
C. Car. 199.
2. R. Ah. 178.
304.

C. Jac. 259. (g) *Sup. c. 26. sect. 64.* 2. *Rich. 3. 12.* *Keilway 134.* *F. Char.*
 21. (b) *Sup. c. 26. sect. 64.* 37. *H. 6. 4.* *Ab. F. Grant 21.* *B. Chart. de P. 24.*
 2. *Rich. 3. 12.* 5. *Edw. 4. 3.* (d) 37. *H. 6. 4.* *F. Chart. 21.* *Pardon 4. 5.* *Bro.*
Charter de Pardon 24. *Recogniz. 22.* 11. *H. 7. 12.* 12. *Coke 29, 30.* *B. r. c. 60.*
sect. 17.

Señ. 35. And upon the same ground it seems to be
 clearly agreed, that as the release of a person robbed, or of the

(a) 8. H. 4. the wife or heir of a person killed, will not (a) bar an indictment or a demand of execution at the suit of the king; so neither will a pardon (b) by the king be any bar to an appeal, except only where it is carried on at the suit of the king, after a nonsuit of the party, in which case it may be barred by a (c) pardon, in the same manner as an indictment. But if one who appears to be attainted of felony, whether by outlawry or otherwise, on an appeal carried on at the suit of the party, get a pardon from the king, he (d) must sue a (e) *scire facias* against the appellant before the pardon shall be allowed, unless the appellant appear (f) *gratis*, and confess that he will sue no farther, &c.

(b) See the authorities cited to the other parts of this section, and B. Appeal 150.

(c) Inst. 237. sect. 13. Sup. c. 25.

(d) B. Appeal 33. (d) Dyer 34. S. P. C. 104. Summary 251. 11. H. 4. 11. H. 4. 48. 9. H. 7. 5. 2. Rich. 3. 8. 9. H. 4. 1. 13. H. 4. 6. 38. H. 6. 13. and the authorities cited to the other parts of this section. (e) That the appellee may have such a *scire facias* of course on such a pardon, without producing a release or other deed from the appellant, 9. H. 7. 5. Ab. F. *Scire facias* 56. B. *Scire facias* 166. 2. Rich. 3. 8. S. P. C. 104. Con. 11. H. 4. 16. Ab. B. *Scire facias* 73. that there was no need of any *scire facias* where an appeal was abated by the king's death, and the year and day were passed, 2. H. 7. 10. B. Chart. of Pardon 69. (f) 11. H. 4. 16. F. Corone 87. Same case B. Confession 12. and Jour in Court 21. But it is made a wonder that a *scire facias* was not awarded.

(g) S. P. C. Sect. 36. If the appellant appear on the *scire facias*, it is certain that he may pray execution notwithstanding the pardon: but if the sheriff have returned a (b) *scire facias*, or two (i) *nihil*s, and the appellant appear not (k) upon demand, the appellee shall be discharged. Yet if the appeal be of death, and the sheriff return the appellant dead, there are some (l) authorities that a *scire facias* ought to go against the next heir to the deceased, but the greater number of (m) authorities seem to be to the contrary.

(h) 8. H. 4. 1. Ab. F. Sc. Fa. 63. B. Ch. de Par. 14. (i) 11. H. 4. 11. 11. H. 4. 48. 19. H. 4. 6. Ab. F. Corone 166. F. Corone 85. Sup. c. 23. f. 38. & 41. (j) 9. H. 7. 5. Ab. Sc. Fa. 56. B. Sc. Fa. 166. F. Appeal 88. 144. 38. H. 6. 13. B. Appeal 141. C. de Par. 28. Sup. c. 23. f. 38. & 41.

(n) Dyer 34. Sect. 37. There is said (n) to be no need of any *scire facias* on such a pardon against the lords mediate or immediate, because the pardon no way tends to reverse the attainder, and consequently can do no hurt to their title of escheat, &c. grounded on the attainder, but rather affirms it.

Sect. 38. If several persons be outlawed in an appeal, and one of them be pardoned, and get his pardon allowed on the non-appearance of the appellant on a *scire facias*, &c. and afterwards another of them get his pardon; it seems,

seems, that he shall take no (a) advantage of the appellant's default on the first *scire facias*, but must sue out his *scire facias*, &c. in the same manner as if there had been no such default.

(a) 1. H. 4. 1.
F. So. Pa. 63.
But B. C. de
Par. 14. in
the Ab. of
the same case
holds the contrary.

Sec. 39. It is holden by great (b) authorities, that if a person be convicted of manslaughter upon an appeal of death, the king may pardon the burning in the hand; for which this reason is given by Sir Edward Coke, that it is no part of the judgment at the suit of the party, but a collateral and exemplary (c) punishment inflicted by the statute of 4. Hen. 7. c. 13. But this is made a *quære* by (d) others, and the principal case wherein it is said to have been resolved, is very differently (e) reported, and was never adjudged (f): And the ground laid down, that the king may pardon it because it is no part of the judgment at the suit of the party, by which it seems admitted, that if it were part of the judgment, the law would be otherwise, seems rather to make against it than for it; for there are (g) precedents of express judgments, *quod cauterisetur in manu sua læva*. Also it is (b) admitted, that where a defendant is to have a certain imprisonment, &c. at the suit of the party upon a statute, the king cannot dispense with it except in some special (i) cases, wherein it may be reasonably intended that such imprisonment was given by the statute by way of satisfaction to the public justice only; in which case it seems agreed, (k) that the king may dispense with it, as it is said that he may with finding of sureties by one convict on the statute against trespasses in parks.

(b) Sum. 252.
3. Inst. 237.
Hobart 294.
cited 4. State
Trials 382.
(c) But my Ld.
Hobart f. 294.
says, that it is
no part of the
judgment, nor
so much as in
the nature of
the punish-
ment, but on-
ly a mark to
notify that
the party may
have his cler-
gy but once.
(d) Raym.
369, 370.
Dyer 202, 262.
C. Eliz. 464.
(e) Bigging's
Case,
5. Coke 50.
C. Eliz. 632.
682.
Moor 571.
(f) Raym.
371.
(g) Rastal 2.

56. Yet it is omitted 55. (b) 5. Coke 50. Dyer 261. 323. (i) 3. Inst. 171.
237. 2. Inst. 200. 439. (k) Dyer 238. 3. Inst. 171. 2. Inst. 200.

But it seems doubtful, whether the statute of 4. Hen. 7. c. 13. which appoints the burning of the hand, can well admit of such a construction; for the words are, "whereas upon trust of the privilege of the Church, diverse have been more bold to commit murder, &c. because they have been admitted to their clergy as oft as they have offended; for avoiding of such presumptuous boldness," it is enacted, "That every person not being in orders, who hath once been admitted to his clergy, be not again admitted thereto, and that every such person convict, &c. shall be marked, &c." from whence it seems plain, that the statute expressly intends such marking as a discouragement of the offence; and it seems difficult to give a reason why

why it should be construed to mean it only as a collateral and not as a direct punishment.

Neither doth it seem a plain reason, that because the statute intended it an exemplary punishment, the king may dispense with it: for surely the execution of an appellee attainted of murder, and the perpetual imprisonment of a clerk delivered to the ordinary upon a conviction on an appeal, who could not make his purgation, were also exemplary punishments; and yet it is generally (a) agreed, that the king never could dispense with them. And therefore upon the whole this seems to be a point that deserves to be farther considered.

(a) Sup. f. 35.
Coke 30.
Dyer 261.
Yet it is made
a quere,
Dyer 200.

whether the king could not pardon such imprisonment.

Señ. 40. But granting that the king may pardon the burning in the hand in an appeal, it seems a very reasonable (b) consequence, that the party shall immediately be delivered by force of the statute of 18. Eliz. c. 7. which says, that after burning he shall be delivered; which ought to have this construction, that he shall be delivered after burning, where he is to be burned.

(b) 5. Coke 50.
Vide c. 33.
f. 131.
C. Car. 596,
297.
Hobart 294.

Señ. 41. It seems to have been always agreed, (c) that the king's pardon will discharge any suit in the spiritual court *ex officio*.

(c) 5. Co. 51.
C. Eliz. 684.
C. Car. 113,
114.

Also it seems to be (d) settled at this day, that it will discharge any suit in such court *ad instantiam partis pro reformatione morum*, or *salute animæ*, as for defamation, or laying violent hands on a clerk, and such like; for such suits, like those in the star-chamber, are in truth the suits of the king, though prosecuted by the party.

(d) 5. Co. 51.
Winch 125.
C. Jac. 335.
Hobart 81.
Con. C. Eliz.
634.

Also it seems to be (e) agreed, that if the time to which such pardon hath relation, be prior to the award of costs to the party, it shall discharge them: And it seems to be the general (f) tenour of the books, that though it be subsequent to the award of the costs, yet if it be prior to the taxation of them it shall discharge them; because nothing appears in certain to be due for costs before they are taxed.

(e) C. Jac.
335.
C. Car. 9.
Vide C. Car.
667, 668.
(f) 1. R.
Apr. 304.
299.
Coke 51.
Litch 190.
Nov 85. 91.

C. Car. 46, 47. Vide C. Car. 9. wherein it is holden, that an award of costs, though they have not been taxed, shall not be avoided by a pardon; but the other books seem contrary.

Also, (a) if a person be imprisoned on a writ of *excommunicato capiendo* for his contumacy in not paying costs, and afterwards the king pardon all contempts, it seems, that he shall be discharged of such imprisonment without any *scire facias* against the party, because it is grounded on the contempt, which is wholly pardoned; and the party must begin anew to compel a payment of the costs.

nication can be discharged by the king's pardon. 3. Coke 68, 69.

SECT. 42. But it seems agreed, (b) that a pardon shall not discharge a suit in the spiritual court, any more than in a temporal, for a matter of interest or property in the plaintiff, as for tithes, legacies, matrimonial contracts, and such like.

Also it is (c) agreed, that after costs are taxed in a suit in such court at the prosecution of the party, whether for a matter of private interest, or *pro reformatione morum*, or *pro salutæ animæ*, as for defamation, &c: they shall not be discharged by a subsequent pardon.

cited to the precedent section.

SECT. 43. If the offence be pardoned after costs are taxed, and then the defendant appeal to a superior court, which gives new costs, whether upon the affirmance or reversal of the first sentence, they shall (d) not be avoided by reason of the pardon, because they are not given in respect of the offence, but of the award of the former costs, which being taxed before the pardon, are not avoided by it, and therefore the appeal was proper for determining whether they were well given or not. But if the offence for which the suit was in the spiritual court be pardoned, hanging an appeal, and such pardon relate to a time precedent to the award of the costs, and after such pardon the appellant desert his appeal, and the spiritual court award costs against him in respect of such desertion, it seems, (e) that he may have a prohibition, because the pardon having discharged the costs of the first suit as well as the offence, made the appeal to be to no purpose. It is (f) said, that costs taxed to the party grieved for a contempt in a court of equity are not discharged by a general pardon of all contempts, because it is the common course of a court of equity to award such costs at the pleasure of the judge. But it hath been questioned, whether costs taxed by the prothonotary upon an attachment to the party grieved be not discharged by a general pardon of all contempts.

(a) 1. St. Tr. 715. *Sec. 44.* It was insisted (a) by the house of commons in the earl of *Danby's case*, and it is enacted by 12. and 13. Will. 3. c. 2. "That no pardon under the great seal be pleaded to an impeachment by the commons in parliament."—† But after the impeachment is solemnly heard and determined, it is not understood that the king's royal grace is farther restrained or abridged*; for after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's pardon.

4. Com. 392. *Sed. vide* the speech of Mr. Lechmere in favour of the impeachment, 6. State Trials 4.

As to the tenth particular, *viz.* Whether a pardon may be conditional.

Sec. 45. It seems agreed, (b) that the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend.

As to the eleventh particular, *viz.* Where a pardon is void in respect of a wrong recital.

(c) Yelverton 43. 47. 48. *Sec. 46.* It being a general rule, (c) that wherever the king appears to have been deceived, his grant is void, I take it to be agreed, that if it appear from the recital of a pardon, that the king was misinformed either as to the (d) nature of the case, or the proceedings thereupon, the pardon is void; as where the (c) king pardons a man for felony whereof he stands indicted, or indicted and attainted, and in truth he never was indicted, &c.

C. Jac. 18. 34. R. Ab. 188. Dyer 552. C. Jac. 548. (d) Raym. 13. 1. Siderfin 42. (e) 3. Inst. 238.

Sec. 47. How a pardon of felony shall be avoided by statute in respect of a wrong suggestion, hath been already shewn, section the tenth.

As to THE SECOND GENERAL POINT, *viz.* What is the effect of a pardon.

Sec. 48. I take it to be settled at this day, that the pardon of a treason or felony even after a conviction or attainder, does so far clear the party from the infamy and all other (f) consequences of his crime, that he may not only have an action (g) for a scandal in calling him traitor or felon

(f) Vide 1. Keb. 940. F. Corone 114. 281. 1. Affize 3. C. Car. 55. 1. Siderfin 222. 5. Coke 49. (g) Hobart 47. 81. 82. Moor 863. 872. 1. R. Abr. 27. Owen 150. 1. Brownlow 10. Raymond 23. Con. Cro. Jac. 622.

felon

felon after the time of the pardon, but may also be a good witness notwithstanding the (a) attainder or conviction; because the pardon makes (b) him as it were a new man, and gives him a new capacity and credit.

4. State Trials 119. 5. Modern 15, 16. Raymond 369, 370. 2. Hale 278. But the contrary is held, Bullstrode 154. and 2. State Trials 520 to 524. Raymond 379, 380. (b) Skinner 578, 579. 4. State Trials 119. Reilley's Case, Cases C. L. 360.

SecT. 49. And it hath been (c) admitted, that the king's (c) 4. St. Tr. pardon of the burning of the hand on a conviction of manslaughter had the same effect as to this purpose, as the burning would have had, which is (d) agreed to restore the party (d) Sup. c. 33. to his credit. sect. 129.

SecT. 50. But it hath been adjudged, (e) that a pardon (e) By the is of no manner of force, as to this purpose, till it have lords in the passed THE GREAT SEAL. earl of Warwick's trial, 5. State Trials 167 to 173.

SecT. 51. Also it is said, (f) that the pardon of a felony (f) Hobart will not make an arrest for it, by one who did not know 67. 81. of the pardon, unlawful, because such arrests being for the public good are to be favoured; and therefore shall not be actionable by reason of such a pardon, as scandalous words shall be, because they deserve no favour.

† And it is enacted by 4. Geo. 1. c. 11. f. 2. "That where any offender shall be transported, and shall have served his term according to the order of the court, such service shall have the effect of a pardon to all intents and purposes, as for the crime for which he was so transported, and shall have so served."

SecT. 52. I do not (g) find it clearly settled, whether the pardon of a conviction of perjury makes the party a good witness. (g) 3. St. Tr. 520 to 524.

Raymond 369, 370, 379, 380. Kelynge 37, 38. 1. Sidersin 52, 221, 222. 3. Levinz 426. A pardon of perjury at common law restores the party to his credit and competency, Gilb. L. E. 142. Reilley's case, Cases in C. L. 360.; but by 5. Eliz. c. 9. the king is by express words restrained from pardoning a perjury on the statute, Gilb. L. E. 142. 2. Hawk. ch. 69. f. 12.

SecT. 53. If a man be convicted, or deprived, or otherwise punished for an offence during a session of parliament, and at the same session an act passeth which pardons the offence, it seems agreed, (b) that the conviction or deprivation, &c. are *ipso facto* avoided; because the act taking effect from the first day of the session, it now appears that

that the offence was pardoned at the time of the conviction, &c.

Also it hath been adjudged, that where an act of parliament expressly pardons such and such crimes from a certain day before the session, it thereby avoids all (a) convictions, and (b) deprivations, and (c) awards of costs and amerciaments (d), &c. for such crimes, whether such convictions, &c. were before or after the session, because it appears to be the intent of the parliament that such crimes shall no way be punished, which cannot take effect if such convictions, &c. continue in force.

(a) 6. Coke

14.

C. Car. 67.

68. 114, 115.

Wide Latch

22. 147.

8. H. 5. 2.

36. H. 6. 1. 2.

F. Times 21.

Pardon 6.

(b) 6. Coke 13, 14. But this case has often been denied to be law, 1. Keble 780. 1. Siderfin 164. 222. (c) Latch 190. Noy 91. Cro. Car. 47. (d) 36. H. 6. 24, 25. 37. H. 6. 21. F. Chart. 22. 5. Coke 49. Co. Litt. 126. C. Jac. 64. Moor 394. Cro. Eliz. 768. 778. Whether an excommunication be pardoned by a general pardon of all contempts, &c. Sup. sect. 41.

(c) 1. Levinz

8. 120.

2. Modern 53.

1. Keble 695.

757. 817. 921.

922.

3. Modern 101.

241, 242.

1. Saunders

362, 363.

1. Siderfin 167, 168. 264. Thelol. 1. 1. c. 84. sect. 3. (f) Dyer 34. Finch 467. Thelol. 1. 1. c. 15. sect. 3. (g) 5. Coke 110. Owen 87. 4. State Trials 219. 2. Modern 53.

(b) 1. Lev.

120.

1. Keble 695.

757. 817. 921.

922.

1. Saund. 362.

1. Siderfin

167. 214.

Sett. 54. But it seems to be a settled (e) rule, that no pardon by the king, without express words of restitution, shall divest, either from the king or (f) subject, an interest either in lands or goods vested in them by an attainder or conviction preceding. Yet it seems (g) agreed, that a pardon prior to a conviction, shall prevent any forfeiture either of lands or goods.

Sett. 55. It hath been adjudged, (b) that a clause of release of "all judgments and executions" in a general pardon extends as well to debts due to the king by assignment or forfeiture, as to those originally due to him, and that it doth not restore them to the person who assigned or forfeited them, but extinguishes them in the hands of the debtor.

Sett. 56. It seems agreed, that notwithstanding the king's pardon to a simonist coming into his church contrary to the purport of 31. Eliz. c. 6. or to an officer coming into his office by a corrupt bargain, contrary to the purport of 5. and 6. Edw. 6. c. 16. may save (i) such clerk or officer from any criminal prosecution in respect of the corrupt bargain; yet shall it not (k) enable the clerk to hold the church, nor the (l) officer to retain the office, because they are absolutely disabled by statute.

(i) Sup. f. 26.

33.

Owen 87. 88.

(k) Het. 104.

Co. Lit. 120.

Watson's

Clergyman's

Law c. 5. (l) 3. Inst. 154. 3. Bulst. 907. 91. See Bk 1. c. 67. f. 9. 1. Keble 781.

Señ. 57. Also it seems (a) agreed, that the king's pardon cannot save the corruption of blood by attainder of 8. a. 391. treason or felony.

(a) Co. Lit.
3. Inst. 233.
240, 241.

1. Hale 358. 2. Comm. 254. 4. Comm. 395.

As to THE THIRD GENERAL POINT, viz. Whether a pardon may be waived.

Señ. 58. I take it to be (b) agreed, that a general pardon by parliament cannot be waived, because no one by his admittance can give a court a power to proceed against him, when it appears there is no law to punish him.

(b) See Bk. 2.
c. 64. f. 63.
S. P. C. 173.
169. 103.
B. Notice 1.
26. H. 8. 7.

11. H. 4. 41. B. Corone 30. 200. Indist. 2. F. Corone 89. Crompton 115. Foster 43. 4. Comm. 394.

Señ. 59. But it is (c) certain, that a man may waive the benefit of a pardon under THE GREAT SEAL; as where one who has such a pardon doth not plead it, but takes the general issue, after which he shall not resort to the pardon.

(c) S. P. C.
173. 169.
B. Corone
200.
Kelynge 24.
Jenk. Cent.

129. Hale 252. Foster 40. Wilson 150. and vide the case of Rex v. Haines, Wilson 214. where the benefit of an *act of grace* was allowed after the general issue pleaded.

And now I am to shew in what manner a pardon is to be taken advantage of; which I shall consider,

1. In relation to a general pardon by parliament,

2. In relation to a particular pardon under THE GREAT SEAL.

AND FIRST, As to the pleading of a general pardon by parliament.

Señ. 60. It seems (d) agreed, that if any persons are excepted out of it, the Court is not bound, and some (e) have holden that it hath no power in discretion, to give any person the benefit of it unless it be pleaded.

(d) Sum. 252.
8. E. 4. 7.
C. Car. 32.
Crompt. 115.
C. Eliz. 768.
778.

6. Coke 79. Moor 770. Raymond 23. 2. Inst. 234. 2. Roll. 307. C. El. 2. 4. Moor 619. (e) Leonard 300. C. Eliz. 125. Con. Lane 71. Moor 394. Vide 5. Coke 49. C. Car. 32. Yelverton 126.

Also it seems generally agreed, that if the body of such a pardon either excepts divers particular persons by name, or excepts all those who come under a general description, as "all those who adhered to J. S. &c." no one can demand the

- (a) 8. E. 4. benefit of it, without expressly shewing, in the (a) first case, that he is not one of the persons excepted, and in the latter (b) case, that he is not included in such description. And if he happen to be of the same name with one of the persons excepted by name, it is said, that it will not (c) be sufficient for him to aver that he was none of the persons excepted, without adding that he is a different person from such other of the same name. Which how it can be tried, unless it appear by some additions to the name in the statute, may deserve to be considered.
7. S. P. C. 103. F. Pardon 3. B. Plead 124. Con. 2. Leon. 26. (b) 8. E. 4. 7. S. P. C. 103. F. Pardon 3. Plowden 103. 448. B. Charter 66. 4. H. 7. 8. Dyer 27. 2. State Trials 5. (c) 8. E. 4. 7. S. P. C. 103. F. Pardon 3.

But if the body of a statute be general as to all persons whatsoever, and afterwards some are excepted in the provisoes, (d) perhaps it may be sufficient to plead such a pardon, without any averment that he who pleads it is none of the persons so excepted; it being a (c) general rule, that where a man is within the general words of the body of a record or deed which is qualified by subsequent provisoes, it is sufficient for him to bring his case within such general words, and that the exceptions in such provisoes ought to be shewn of the other side.

(d) Vide 1. Lev. 26. 4. H. 7. 8. Raym. 23. (c) 1. Levinz 26. 88. Raym. 65. C. Car. 515. Vide the earl of Salisbury's case, Shower 100. more fully reported Carthew 131, &c. But see Ratcliffe's case, Foster 43. 45.

- (f) Sum. 252. Sec. 61. But it seems agreed, (f) that the Court is so far bound to take notice *ex officio* of a general pardon by parliament, which extends to all persons in general without exception, that it cannot proceed against any person whatsoever as to any of the offences pardoned, though he be so far from pleading it, or praying the benefit of it, that he does all he can to (g) waive it.
- Plowden 83. 26. H. 8. 7. B. Notice 1. Dyer 28. 5. Coke 49. 3. Inst. 234. 11. H. 4. 41. B. Corone 30. Indictment 2. 2. Roll. 307. (g) Sup. sect. 58.

Sec. 62. Also, where a general act of pardon excepts certain kinds of crimes, there is (b) no need to aver that the crime whereof a person is indicted is not one of such excepted crimes; but the Court ought judicially to take notice whether it be excepted or not.

(b) Noy 100. C. Car. 449. Moor 620. 1. Leonard 26. Carthew 132. Crompton 116. 8. Coke 68. 3. Inst. 234.

- (i) C. Eliz. Sec. 63. Also, where such a statute excepts only one particular person, it hath been (i) said, that there is no need of an averment that a person indicted is not such person; but that the Court is to take notice whether he be or not.
185. 1. Leonar. 26. But see Foster 44. 45.

SECONDLY, As to the taking advantage of a particular pardon under THE (a) GREAT SEAL, I shall observe only the following particulars. (a) That no such pardon is good unless under the

Great Seal, and consequently that articles of surrender cannot be pleaded as amounting to a pardon, 1. Stare Trials 578, &c. Neither can the sign manual importing a pardon be pleaded, Rex v. Beaton, 1. Black. 479. Vide infra sect. 71; the case of the King v. Murphy in July session 1773; and Foster 62.

SECT. 64. FIRST, That it will be (b) error to allow a man the benefit of such a pardon unless it be pleaded. (b) C. Eliz. 153.

SECT. 65. SECONDLY, That he who pleads such a pardon ought to (c) produce it *sub pede sigilli*, though it be a plea in bar, because it is presumed to be in his custody, and the (d) property of it belongs to him. (c) Sum. 254. S. P. C. 103. 11. H. 4. 41. (d) See the books above

cited, and Cro. Jac. 70. 317. Cro. Car. 441, 442. 1. Jones 377. 1. Siderfin 311, C. Eliz. 217. 547. 716.

Yet if a man plead such pardon without producing it, it seems (e), that the Court may in discretion indulge him a farther day to put in a better plea; and at such day he may perfect his plea by producing the charter. (e) 11. H. 4. 41. S. P. C. 103.

Also it seems (f) agreed, that there is no need in a plea of *autrefois acquit*, &c. to produce the record immediately; because it is pleaded in bar, and he who pleads it hath neither the custody nor property of it. (f) Vide sup. c. 35. sect. 2.

SECT. 66. THIRDLY, That if there be a variance (g) between the record on which a man is convicted or attainted, and his charter of pardon, yet if there be no repugnancy to intend that the same person or thing are meant in both, it may be supplied by proper averments: And therefore if one be indicted by the name of "J. S. (h) yeoman," and pardoned by the name of "J. S. gentleman," or indicted by the name of "B. the taker," and pardoned by the name of "B. the son of W.," he may make good the variance by averring that he is the same person intended in such indictment and pardon: Or if in an indictment (i) of the death of J. S. the stroke being supposed to have been given "on the first of August," and in the pardon "on the third," the party may aver that the death of one and the same J. S. are intended in both. And if such a variant pardon be pleaded without any such averment, it seems that the Court (g) Sum. 253. Sup. c. 35. 4. 3. 4. 5. 3. Inst. 240. S. P. C. 104. Crompton 116. (h) Keilway 58. Dyer 34. 1. Roll. 368. F. Corone 294. But 18. Ed. 3. 33. Ab. F. Briefs 364. (i) 11. H. 4. 41. Ab. F. Mon.

de Faits 128. B. Variance 38. B. Corone 29. B. Charter de Pardon 15. But note, that none of these books make mention of any averment, but seem to imply that the pardon was allowed without it, notwithstanding the variance.

may in discretion give the party a farther day either to
 (a) 11. H. 4. (a) perfect his plea, or to (b) purchase a better pardon :
 41. And there are some (c) instances in old books, where upon
 P. Mon. de such variance the Court took an inquest of office, whe-
 Faits 128. ther the same person were meant in both records.
 (b) 3. Inst. 220.
 2. Siderfin 41. 26. Affize 46. Raymond 13. F. Office de Court 34. B. Charter
 de Pardon 32. B. Office de Court 25. (c) F. Cor. 294. 3. Affize 15. Ab. F.
 Corone 166. B. Cor. 190. B. Variance 63. But Brook, in abridging this case
 under the title of Charter of Pardon 29. makes this remark, *quod mirum nubi*.

Vide sect. 59. Sect. 67. FOURTHLY, That no such pardon can be
 where this pleaded together with, or after the general issue, unless it
 point is treat- be of a date subsequent to the time of the pleading such issue,
 ed of ; and because otherwise it is waived by it.
 Ratchiffe's
 Case, Foster C. L. 40.

(d) 37. H. 6. 4. Sect. 68. FIFTHLY, (d) That the party shall not be
 F. Charter 21. obliged to lay the stress of his case on any particular words
 or clause in such pardon, but may take advantage of the
 whole.

(e) 36. H. 6. Sect. 69. SIXTHLY, That after an (e) amerciamment in
 44, 25. the king's bench hath been estreated into the exchequer,
 F. Charter 22. and the party, being taken upon process from thence,
 B. Charter 25. hath insisted upon a pardon, and been denied any benefit
 from it, yet he may be brought by a *habeas corpus cum*
causa to the king's bench, because the record remains
 there, and the transcript is only sent into the exchequer,
 and may plead the same pardon in the king's bench, and
 if it be adjudged sufficient, may have a *superfedas* to the
 barons, &c.

Sect. 70. SEVENTHLY, That while the statute of
 10. Edw. 3. c. 2. stood in force (which required all per-
 sons pardoned for felony to find sureties for their good be-
 haviour before the sheriff and coroners within three months,
 &c.) no pardon of (f) felony could be allowed, without
 (f) S. P. C. a writ out of chancery, commonly called a *writ of allow-*
 103. *ance*, testifying that the party had found (g) sureties, &c.
 Crompton according to that statute, unless it were dispensed with by
 115. a special clause of *non obstante*, &c.
 3. H. 7. 5.
 Plowden 502.

1. Keble 9.
 3. Siderfin 41. Raymond 13. 3. Inst. 234, 235. Carthew 121. But there never
 was any necessity for such writ upon a pardon of treason. C. Eliz. 814. Noy 31.
 (g) That a breach of the recognizance avoided the pardon, 3. Hen. 7. pl. 7. S. P. C.
 109. Crompton 115. See Rex v. Chetwynd, Strange 1203. 9. State Trials 542.

But the necessity hereof is taken away by 5. and 6. Will.
 and Mary, c. 13. which hath repealed the said statute of
 10. Edw.

10. Edw. 3. but hath provided, " That the justices before whom any pardon for felony should be pleaded, may at their discretion remand, or commit the person who pleads it to prison, till he or they shall enter into a recognizance with two sufficient sureties for the good behaviour for any time, not exceeding seven years. Provided that if such person be an infant or *feme covert*, he or she may find two sufficient sureties, who shall enter into a recognizance for his or her being of the good behaviour, as is aforesaid."

Sec. 71. EIGHTHLY, That the Judges may insist on the usual fee of gloves (a) to themselves and officers, before they allow a pardon.

(a) Fitzherbert's Abridgment, tit. Corone 294.

4. E. 4. 10. 2. Jones 56. 1. Siderfin 452. Kelynge 25. Pulton de Pace et Regis 22.

† *Sec. 72.* NINTHLY, That the mode of taking advantage of a pardon upon the Circuits and at the Old Bailey is to procure the king's sign manual or privy seal signifying his majesty's intention to afford a pardon to the prisoner, either absolutely or conditionally as the case may be, and directing the justices of the gaol-delivery to bail him, on his entering into a recognizance to appear and plead the next general pardon that shall come out. This mandate the justices obey; taking security, if the pardon is conditional, for the performance of the stipulation upon which it is granted; and afterwards issuing their warrant to the gaoler for his discharge.

1. Black. Rep. 479.
2. Black. Rep. 797.

CHAPTER THE THIRTY-EIGHTH,

OF THE

GENERAL ISSUE.

HAVING shewn already, that the *general issue* is pleadable in capital cases, together with any other plea in bar or abatement which is not repugnant to it; and that it may also be pleaded even after such plea found against a defendant (*a*): And having also shewn, that the plea of the general issue amounts to a waiver of a pardon (*b*): And what is a good general issue to an information on a penal statute (*c*); and in the same chapter in what manner the issue is to be joined on such an information, and where it is to be tried (*d*):

(*a*) Chap. 23.
sect. 128. & 131.
(*b*) Chap. 37.
sect. 59.
(*c*) Chap. 26.
sect. 66.
(*d*) Sect. 73.
74.
4. Comm. 334.

I shall in this place take notice only of the following particulars.

Sect. 2. FIRST, That in a criminal information or indictment in the (*e*) king's bench for a misdemeanor, and also in an indictment before (*f*) justices of the peace, the issue is well joined for the king by the words "*A. B. qui pro rege sequitur similiter, &c.*" without any addition shewing that *A. B.* is the proper officer for this purpose; for it shall be intended that he was sufficiently known to be such by the Court. But in all (*g*) precedents I meet with of informations of intrusion, the issue for the king is joined by the Attorney-general, (*b*) naming himself such.

(*e*) 1. Sid. 230.
Co. Ent. 363.
(*f*) C. Car. 31.
(*g*) 1. Coke
17. 27.
Co. Ent. 372.
379. 381. 385.
387. 390.
Rastal 412.
(*b*) Coke 352
to 361.
Rastal 385.

Sect. 3. SECONDLY, That in indictments of capital crimes, after the defendant hath pleaded "*quod ipse in nullo est inde culpabilis, et inde de bono et malo ponit se super patriam*" (which is the general form of pleading the general issue in capital cases, both in (*i*) indictments and (*k*) appeals), the usage seems to have been immediately to award process against the jury, without any express joining of issue on the part of the king (*l*). But in the precedents of appeals of felony, whether by an (*l*) appellant or (*m*) approver, generally the issue is expressly joined by the appellant and approver, as well as the appellee.

(*i*) See the precedents above cited.
(*k*) Coke Ent. 57.
Rast. 47 to 55.
(*l*) 4. Burr. 2084. 2085.
Tremain 286.
8. St. Tr. 287.
agree that it

is not necessary to join issue on record. And see *Rex v. Dowlin*, 5. Term Rep. 311. Sed vide 9. Rep. 63. (*l*) See the precedents cited to the precedent letter. But in Rastal 43. after the general issue with an &c. the process is immediately awarded against the jury. (*m*) Rastal 42.

(a) H. 4. 35.
B. App. 19.

ScA. 4. THIRDLY, It seems (a) the better opinion, that if an issue be joined in process on a recognizance for the peace, whether the defendant killed *J. S.* and such issue be found for the king, yet shall it not estop the defendant to plead not guilty to an indictment or appeal for the death of the same *J. S.*

Kinloch's
Case, Fost. 16.

+ *ScA. 5.* FOURTHLY, It seems, that on the general issue "not guilty" being pleaded, the defendant cannot take an objection in law, which is in the nature of a plea, to the jurisdiction of the Court, nor can any evidence be received to support such an objection on that issue, but such matter must be specially pleaded.

CHAPTER THE THIRTY-NINTH.

OF

ASSIGNING COUNSEL.

A PERSON having pleaded "not guilty," is to be tried either,

1. By his country.
2. By his peers.
3. By battle.

But before I consider what is proper to each of these in their order, I shall endeavour to shew,

1. In what cases a prisoner may have counsel to assist him in his defence.
2. Where he may have a copy of the indictment.

As to the first of these particulars, *viz.* In what cases a prisoner may have counsel to assist him in his defence.

Secd. 1. I take it to be a settled (*a*) rule at common law, that no counsel shall be allowed a prisoner, whether he be (*a*) 3. *Inst.* 29. 137.
 a (*b*) peer or commoner, upon the general issue, on an indictment of treason or felony, unless some point of law arise proper to be debated. 7. *H.* 4. 35. Finch 386.
 2. *Bull.* 147. B. Cor. 54.
 F. Corone 31. C. Car. 147. S. P. C. 151. 9. E. 4. 2. 1. Levinz 86. Dr. and St. b. 2. c. 48. 1. St. Tr. 70. 2. Stat. Tr. 1002. See the books cited to the other parts of this Chapter. (*b*) 1. St. Trials 70. 265. 614. 4. St. Trials 355. 3. *Inst.* 29. 1. *Rush.* Col. 94. Foster 231.

Secd. 2. This indeed many have complained of as very unreasonable; yet if it be considered, that generally every one of common understanding may as properly speak to a matter of fact, as if he were the best lawyer; and that it requires no manner of skill to make a plain and honest defence, which in cases of this kind is always the best; the simplicity, the innocence, the artless and the ingenuous behaviour of

(a) 2. Bulst.

147.

3. Inst. 29.

See the opinions of Mr. Justice Foster,

Discourse of

High Treason,

sect. 7. p. 231,

232. and of Sir

Robert At-

kins upon this

point. 3. Stat.

Trials 758.

4. St. Trials

130. 174.

See 4. Comm. 349.

of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own. And if it be further considered that it is the (a) duty of the Court to be indifferent between the king and prisoner, and to see that the indictment be good in law, and the proceedings regular, and the evidence legal, and such as fully proves the point in issue, there seems no great reason to fear but that, generally speaking, the innocent, for whose safety alone the law is concerned, have rather an advantage than a prejudice in having the Court their only counsel. Whereas, on the other side, the very speech, gesture, countenance, and manner of defence of those who are guilty, when they speak for themselves, may often help to disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them.

Sec. 3. But the law allows a defendant the same benefit

(b) S. P. C.

151.

Dr. and St.

bk. 2. c. 48.

Dyer 296.

Keilway 176.

Finch 386.

1. Bulst. 85.

9. E. 4. 2.

B. Corone 54.

F. Corone 31.

of council in an (b) appeal, whether capital or not capital, as in any other action. Perhaps for this reason among (c) others, because appeals are presumed to be generally carried on with greater heat and spleen than indictments, and yet are not so much to be favoured, as being for the most part rather grounded on a desire of private revenge than of public justice; and therefore the defendant shall have at least the same advantage in them as in common actions.

(c) Dr. and St. bk. 2. c. 48.

Sec. 4. Also upon indictments, the Court will never refuse to assign the prisoner counsel to argue a doubtful point of law, happening to arise at or after his trial; as where it shall appear questionable whether the facts proved, if true, fully (d) amount to the crime charged against him; or whether the persons offered to be evidence against him be (e) legal witnesses, in respect to such or such exceptions against them; or whether certain persons returned (f) of his jury can be lawful jurors, in respect of certain objections against them; or whether the (g) indictment or (h) process, &c. be strictly legal: in all which cases the prisoner must (i) propose the point, and (k) if the Court think it will bear a debate, they will assign him counsel to argue it.

(d) 3. Inst.

137.

1. St. Tr. 569.

Rush. Staf-

ford 671.

(e) 2. St. Tr.

520.

(f) 3. St. Tr.

135.

(g) 3. Inst. 29.

1. Levinz 68.

C. Car. 147.

2. Hale 236.

(h) 3. Inst. 29.

137.

694. 701. 709.

763. 764.

3. St. Tr. 876.

(i) 3. Inst. 137. 2. St. Tr. 762. (k) 2. St. Tr.

Sec. 5. Also, wherever a prisoner hath a (l) pardon

or other (m) special matter to plead to an indictment, or

(l) 3. Inst. 29.

137.

26. Affize 46.

F. Off. de Court 34.

(m) 1. H. 7. 23 B. Corone 128, 129. Finch 386.

an

an (a) error to assign in order to reverse an outlawry, the Court will of course assign him counsel. And it is (b) said, that for such collateral matters any one may be of counsel for a prisoner without any assignment.

1. Hen. 7. 13. the Court refused it, because the party was of very bad fame. 2. Jones 180. Strange 824. 9. State Trials 85. Foster 232. See also Ratcliffe's case, Foster 42. where upon the trial of a collateral issue the prisoner had the assistance of counsel.

Sec. 6. But if a question arise on the trial of a peer concerning the course of parliamentary proceedings, the lords will not (c) suffer it to be argued by counsel, but will debate it among themselves.

(c) 2. St. Tr. 694. 699. Vide the trial of the Dukes of Kingston for bigamy, before the peers, 11. State Trials.

Sec. 7. There is a case in the Year-Book of (d) Henry the fourth, where a serjeant at law, as *amicus curiæ*, offered his opinion to the Court concerning the trial of an indictment of death, that it was not proper to proceed in it till the year and day were passed, nor doth he appear to have been any way reprehended for it. (e) But it is not safe for any one to be either counsel or solicitor to one in prison for a capital crime, in order to prepare him for his trial, without an assignment from the Court. But by leave of the Court, prisoners have sometimes been indulged the assistance of counsel, not only to (f) advise them in prison, but (g) also to stand by them at the bar: but it is said, (h) that, in strictness, they ought not to be prompted by them as to matters of fact, (i) nor to have the assistance of any papers drawn up by counsel to prepare them for their trial.

(d) 7. H. 4. 36. S. P. C. 151. 3. Inst. 29. 137. (e) 2. St. Tr. 272, 273. 712. 743. 763. 768. (f) 3. St. Tr. 133. (g) 2. St. Tr. 614. (h) 2. St. Tr. 614. (i) 1. St. Tr. 732. 2. St. Tr. 743. 762, 763. 770.

Sec. 8. After a prisoner hath had counsel assigned him, the Court will not (k) discharge them without his consent, though they desire it, but will sometimes add others to them.

Sec. 9. It is (l) said, that the Court cannot assign an appellee any of the king's counsel; but that if they will, they may be either for or against them.

Sec. 10. It having been found by experience that prisoners have been often under great disadvantages from the want of counsel, in prosecutions of high treason against the king's person, which are generally managed for the crown with greater skill and zeal than ordinary prosecutions, it is enacted by 7. Will. 3. c. 3. "That all and every person and persons whatsoever that shall be accused and indicted for high treason, whereby any corruption of blood may

See Henry's case, 1. Burr. 638. Sir Bartholomew Shower was the first counsel assigned by virtue of this act.

(a) In the case of Lord

George Gordon, Mr. ER-

KINE moved that counsel might be as-

signed; but BULLER, *Justice*, doubted whether this application ought not to be made by the prisoner himself at the bar, the words of the statute being, "upon *his* or *their* request;" but the Attorney-general consenting, the motion was allowed. Douglas 591.

"or shall be made to any such offender or offenders, or to any the heir or heirs of any such offender or offenders, or for misprision of such treason, shall be received and admitted to make his and their full defence by counsel learned in the law: and in case any person or persons so accused or indicted shall desire counsel, the Court, before whom such person or persons shall be tried, or some judge of that court, is authorised and required, immediately upon his or their request, (a) to assign to such person or persons, such and so many counsel, not exceeding two; as the person or persons shall desire, to whom such counsel shall have free access at all reasonable hours; any law or usage to the contrary notwithstanding."

Sect. 11. But by 7. Will. 3. c. 3. f. 3. it is provided, "That any person being indicted of such treason may be outlawed, &c. and where by the law, after such outlawry, he may come in and be tried, he shall upon such trial have the benefit of the said act."

See *Ld. Win-*
ston's case,
6. State Trials
P. 17.

Sect. 12. And by 7. Will. 3. c. 3. f. 12. and 13. it is further provided, "That nothing in the said act shall extend; or be construed to extend to any impeachment or other proceedings in parliament whatsoever. And also, that it shall not any ways extend to any indictment of high treason, nor to any proceedings thereupon for counterfeiting his majesty's coin, his great or privy seal, his sign manual, or privy signet."

+ *Sect. 13.* But now by 20. Geo. 2. c. 30. it is also enacted, "That all and every person and persons whatsoever who shall be impeached by the commons of *Great Britain* of any high treason, whereby any corruption of blood may or shall be made to any such offender or offenders, or to any the heir or heirs of any such offender or offenders, or for misprision of such treason, shall be received and admitted to make his or their full defence by counsel learned in the law, not exceeding two counsel, who shall be assigned for that purpose, on the application of the party or parties impeached at any time after the articles of impeachment shall be exhibited by the commons."

CHAPTER THE THIRTY-NINTH.

CONTINUED.

OF

GRANTING

A COPY OF THE INDICTMENT.

AS to the second particular, *viz.* Where a prisoner may have A COPY OF THE INDICTMENT against him.

Sec. 13. It is said, (a) that by the common law it is always denied in cases of treason or felony. Yet if a prisoner take a legal exception to an indictment, it is said, (b) that the Court will grant him a copy of so much as concerns his exception. Also, if he have such matter to plead which cannot well be put into form without knowledge of the charge against him as laid in the indictment, as *autrefois acquit, &c.* it is (c) said, that the Court will give him the heads of the indictment, to enable him to have his plea so drawn as to suit the charge against him.

(a) 1. Lev.

68.

Moor 666.

1. St. Tr. 644.

2. St. Tr. 711.

763.

3. St. Tr. 861.

862, 863, 864.

Show. 131.

1. Sid. 85.

2. Hale 436.

(b) 1. Lev. 68.

1. Sid. 85.

(c) 2. St. Tr. 711. Foster 40.

Sec. 14. But by 7. Will. 3. it is enacted, "That every person and persons indicted for high treason, except for counterfeiting the coin, or the great or privy seal, or sign manual or privy signet, shall have a true copy of the whole indictment, but not the names of the witnesses, five days at the least before trial, to advise with counsel thereupon, to plead and make their defence, his or their attorney or agent, requiring the same, and paying the officer his reasonable fees for writing thereof, not exceeding five shillings for the copy of every such indictment."

Sec. 15. It is said this must be intended five days before arraignment, because the prisoner pleads *instantly* upon the arraignment. See 1. Burr. 643. Douglas 595.

What exceptions may be taken to such indictment, and when, hath been shewn, chapter the twenty-fifth. (c) (c) *Sec. 14.* to 150.
VOL. IV. B b *Sec.*

† *Seft.* 16. It is also enacted by 7. Anne, c. 21. f. 11.
 “ That from and after the decease of the Pretender, when
 “ any person is indicted for high treason, or misprision of
 “ treason, a list of the witnesses that shall be produced on
 “ the trial for proving the said indictment, and of the jury,
 (†) 9. St. Tr. “ mentioning the names, (†) profession, and place of abode
 679. the case “ of the said witnesses and jurors, (a) shall be also given at
 of John Ma- “ the same time that the copy of the indictment is delivered
 thews. “ to the party indicted; and that copies of all indictments
 (a) The case “ for the offences aforesaid, with such lists, shall be de-
 of Lord “ livered to the party indicted, ten days before the trial, and
 George Gor- “ in presence of two or more credible witnesses.”
 don, Hilary Term, 21.

Geo. 3. was the first which has happened since this act took eff. &c. The Attorney-general, as the only method of complying with the directions of the act, moved the king's bench for a rule upon the sheriff, to deliver to the prosecutor a list of the jury-men he intended to return upon the panel, in order that the prosecutor might be enabled to deliver such list to the prisoner; and the rule was drawn up accordingly; for the terms of which vide Douglas 591.

† *Seft.* 17. But it is enacted by 6. Geo. 3. c. 53. “ That
 “ nothing contained in the above last recited act shall any
 “ ways extend to any indictment of high treason for coun-
 “ terfeiting his majesty's coin, the great seal or privy seal,
 “ his sign manual or privy signet, or to any indictment of
 “ high treason, or to any proceedings thereupon against
 “ any offender or offenders who by any act or acts now in
 “ force is and are to be indicted, arraigned, tried, and con-
 “ victed by such like evidence, and in such manner, as is
 “ used and allowed against offenders for counterfeiting his
 “ majesty's coin.”

CHAPTER THE FORTIETH.

O F

T H E J U R Y.

FOR the better understanding what more particularly relates to A TRIAL *by the country* in capital cases, having shewn, (a) that by virtue of a special commission, justices (a) Chap. 5. of *oyer and terminer* may sit in one county, for the trial of a fact in another by the proper jurors: And having also shewn (b) what is a proper place from whence *a-vifne* may come: (b) Chap. 23. sect. 92, 93.

I shall in this place only consider,

1. From what county the jury is to be returned.
2. By virtue of what process.
3. Before what court.
4. How they may be challenged.

As to the first of these particulars, *viz.* From what county the jury is to be returned.

I shall endeavour to shew,

1. From what county they are to be returned for the trial of the *general issue*.
2. From what county for the trial of a *foreign plea*.

As to THE FIRST POINT, *viz.* From what county a jury is to be returned for the trial of the general issue.

Sect. 1. I take it to be (c) agreed, that (d) regularly by (c) S. P. C. the common law they must be returned in all cases, for the trial of the *general issue* from the same county wherein the fact was committed. And it is said, that in an appeal of death, where the wound was given in one county, and the

Sup. c. 5. f. 19. (d) Inf. f. 5.

(*a*) B. 1. c. 31. party died in another, the jury (*a*) ought to be returned from
 1. 13. Sup. c. each county before the statute of 2. and 3. Edw. 6. c. 24 since
 23. f. 35. which the whole may be tried either upon an (*b*) indictment
 F. Cor. 59. 60. or appeal in the county wherein the death happens.
 (d) Sup. c. 25.
 L. 25. 2. Hale 162.

Traitors and
 murderers
 examined by
 three privy
 councillors
 may be tried
 in any county
 by special
 commission.

Sec. 2. But it is enacted by 33. Hen. 8. c. 23. "That
 " if any person being examined by the king's council, or
 " three of them, upon any manner of treasons, misprisions
 " of treasons, or murders, do confess any such offences, or
 " that the said council, or three of them, upon such exam-
 " ination, shall think any person so examined, to be ve-
 " hemently suspected of any treason, misprisions of treasons,
 " or murder, that then in every such case, by the king's
 " commandment, his majesty's commission of *oyer and ter-*
 " *miner* under the great seal, shall be made by the chan-
 " cellor of *England* to such persons, and into such vills and
 " places as shall be named and appointed by the king, for
 " the speedy trial, conviction, or delivery of such offenders;
 " which commissioners shall have power to enquire, hear,
 " and determine all such treasons, misprisions of treasons,
 " and murders, within the places limited by their com-
 " mission, by such good and lawful persons as shall be re-
 " turned before them by the sheriff, or his minister, or any
 " other having power to return writs and process for that
 " purpose, in whatsoever other shire or place within the
 " king's dominions, or without, such offences were done or
 " committed, and that in such cases, no challenge for the
 " shire or hundred shall be allowed."

(*c*) 1. And.
 104.

Sec. 3. It hath been (*c*) adjudged, that this statute, as
 far as it relates to treason done within the realm, is repealed
 by 1. and 2. Philip and Mary, c. 10. which enacts, "That
 " all trials for treason shall be according to the common
 " law." But as to (*d*) murder, and (*e*) misprision of trea-
 son, it still seems to continue in force. And as to high (*f*)
 treason done without the realm, it doth not seem material
 whether it be in force or not, because that is fully provided
 for by 35. Hen. 8. c. 2. as hath been more fully shewn,
 Chapter 25. sect. 49, 50, 51, 52, 53.

(*d*) 1. And.
 104.

(*e*) Sup. c. 25.
 141.
 B. Cor. 280.
 1. Inst. 14.
 (f) Dyer 286.

(*g*) 1. And.
 104.

(*h*) Sup. c. 33.
 1. 28. Bk. 1.
 6. 31. f. 11.

Sec. 4. It hath been (*g*) adjudged, that the word "*mur-*
 "*der*" in this statute shall have the same strict construction
 as in the (*h*) statutes which take away the benefit of clergy
 from murder, and consequently shall not extend to one
 examined before the council as necessary only, and not as
 principal; for murder is one offence, and the being access-
 ary to it is another.

Sec. 5.

Sec. 5. Having shewn already, that he who steals (*a*) (*a*) Bk. 1. c. goods in one county, and carries them into another, or does 33. f. 9. a fact in one county which proves a (*b*) nuisance to another, Sup. c. 25. f. 47. may be indicted or appealed in either; from whence it fol- 38. f. 38. lows, that he may be also tried in either: having also (*c*) (*b*) Sup. c. 25. shewn, that he who marries two wives, the first in a foreign (*c*) Bk. 1. c. country, and the second in *England*, may be indicted and 43. f. 7. tried in *England*; and that he who takes a woman by force Sup. c. 25. out of one county, and carries her into another and there sed. 39. marries her, (*d*) may be indicted and tried in the second (*d*) Bk. 1. c. county: and that felonies in (*e*) *Wales* may by force of 42. f. 10. 26. Hen. 8. c. 6. be indicted and tried in the next adjoining Sup. c. 25. English county: and that treasons upon the seas, (*f*) or (*e*) Bk. 1. c. in any foreign (*g*) country, and felonies (*h*) and piracies 31. f. 14. upon the sea, may be indicted and tried in any county in Sup. c. 25. *England*; and that an (*i*) accessory in one county to a mur- f. 41, 42. der in another, may be appealed and tried in the county (*f*) Sup. c. 25. f. 43, 44. wherein the stroke was given; and that an accessory to 45. murder, or any other felony in one county, may be indicted (*g*) Sup. c. 25. f. 43 to 54. (*k*) and tried in the county wherein he was accessory; I (*b*) Bk. 1. c. shall refer to the places cited in the margin for the farther 37. f. 12, 13, 14, 15. consideration of these matters. Sup. c. 25. f. 43 to 48.

(*i*) Sup. c. 29. f. 49. (*k*) Sup. c. 25. f. 54. and c. 29. f. 50, 51, &c.

As to THE SECOND POINT, *viz.* From what county the jury is to be returned for the trial of a *foreign plea*, that is, the plea of issuable matter alledged in a different county from that wherein the party is indicted or appealed; as where a man indicted in the county of *A.* (*l*) pleads, that he was taken out of a sanctuary in the county of *B.* Or, (*l*) *Keilway* 175. where one appealed by a woman for the death of her husband in one county, (*m*) pleads, that since the death of her husband she hath married *J. S.* in another county. (*m*) *Dyer* 296.

Sec. 6. It is (*n*) agreed, that by the common law such pleas can only be tried by juries returned from the counties (*n*) 1. Infl. 47. wherein they are alledged: and therefore if issue be joined 8. P. C. 154. on such matters before a court which has no jurisdiction *Keilway* 175. out of the county wherein it sits, there seems to be (*o*) no *Dyer* 296. remedy by the common law, but to remove the proceedings Sum. 255. by *certiorari* into the king's bench, which having a juris- Vide 23. H. 8. c. 14. f. 5. diction throughout the whole kingdom, will award proper (*o*) *Keilway* 175. process for the trial. *Dy.* 286. 296.

Sec. 7. But for the more speedy trials of murders and felonies, it is enacted by 23. Hen. 8. c. 14. f. 5. " That all manner of foreign pleas triable by the country, upon an indictment for any petit treason, murder, or felony, shall

“ be forthwith tried before the same justices afore whom
 “ the party shall be arraigned, and by the jurors of the same
 “ county that shall try the petit treason, murder, or felony
 “ whereof he shall be so arraigned, without any further
 “ respite or delay, in whatsoever county or counties, place
 “ or places of this realm, the matter of the pleas be supposed
 “ or alledged.”

Stat. 8. But this statute extending neither to indictments
 (a) 3. *Inst.* 27. of high treason, nor to appeals, it (a) is said, that a foreign
 S. P. C. 154. issue therein must still be tried by the jury of the county
 Sum. 255. wherein it is alledged.
Vide Dy. 296.

CHAPTER THE FORTY-FIRST.

OF P R O C E S S

A G A I N S T

J U R O R S.

FOR the better understanding the nature of process against jurors in criminal cases, I shall endeavour to shew,

1. Where a panel may be returned without any precept by a bare award.

2. In what manner the process is to be returnable.

3. Where a *venire* may be joint or several.

4. Where process may be awarded by proviso.

5. In what cases, and in what manner, a *tales* is grantable.

6. Where it is necessary to return a panel into court, before an inquest can be taken upon it, and where the prisoner may have a copy of it.

As to THE FIRST POINT, *viz.* Where a panel may be returned without any precept by a bare award.

Secd. 1. It is (a) agreed, that justices of (b) gaol-delivery (a) F. Inq. 55. may have a panel so returned by the sheriff without any pre- 4. Inst. 168. cept or writ; and the (c) reason given for it is, that before 1. Inst. 568. their coming, they always make a general (d) precept to Sum. 158. the sheriff on parchment under their seals, "to bring before 256. 2. Hale 261. " them, at the day of their sessions, twenty-four out of 264. " every hundred, &c." "to do those things which shall be Crom. 128. " enjoined them on the part of the king, &c." And there- 3. P. C. 255. fore it is said that they need not make any other precept for 4. Comm. 344. the return of a jury, for the trial of any issue joined before (b) Yet 'tis said that the law is otherwise if they have a special commission. F. Inq. 55. 4. Inst. 168. Crompton Jur. 128. (c) F. Inq. 55. Crompton Jur. 128. 4. Inst. 168. 2. Inst. 568. 2. Hale 34. 261. (d) Vide Rast. 384. 385. Cro. Car 448.

(a) 4. St. Tr. 182. them. But that their bare (a) award "that the jury shall confirmed "come" is sufficient, because there are enow for that purpose Foster 43; supposed to be present in court, whom the sheriff may and for the return immediately whenever the Court shall require their form of such an award, see service. Raft. 385.

(b) 2. Inst. Also it is said, (b) that a jury may be so returned before 568. justices of peace at their sessions, because the (c) precept for the summons of the sessions hath a clause to the same effect Adj. 1. Sid. 364. for the summons of twenty-four out of every hundred, &c. (c) See Lamb. Yet I much question whether this matter doth not rather Just. b. 4. c. 2. depend on (d) practice, and the constant course of precedents, than on any argument from the reason of the thing. and Crompton 232. (d) 4. Inst. For the (e) precept to the sheriff from justices of oyer and 164. terminer, in order for the holding of their sessions, hath in 2. Hale 261. effect the very same clause for the bringing of twenty-four 1. Sid. 364. before them, out of each hundred, at the day of their sessions, &c. (e) Raft. 443. (f) 1. Sum. And yet it seems (f) agreed, that they cannot 162. 156. have a jury returned for the trial of any issue joined before 4. Inst. 164. them, by force of a bare award, but ought to make a 2. Inst. 568. particular precept to the sheriff for that purpose under their Foster 64. seals.

(g) S. P. C. Sect. 2. It seems (g) agreed, that by the course of the 154. king's bench no jury can be returned into it from a foreign Vide 27. H. 6. county, without proper process, under the (h) seal of the 10. chief justice, &c. But (i) *quære* if it may not be returned Sup. c. 27. f. 16. for the trial of an indictment, &c. in the same county (h) Sup. c. 27. wherein it sits, by a bare *præceptum est*, &c. i. 8. (i) Dy. 118.

As to THE SECOND POINT, *viz.* In what manner the process against jurors is to be returnable.

Sect. 3. It seems agreed, that it may be returnable immediately into the court of king's bench for the trial of an indictment in the same county wherein it sits, whether for a crime committed in such county, or for a (k) treason, &c. beyond the sea. But that for the trial of indictments, removed thither by *certiorari* from other counties, there (l) ought to be fifteen days between the *teste* and return of every process. (k) C. 25. f. 49. to 70. (l) 2. R. Abr. 626. 2. Hale 260. Sup. t. 3. f. 12. and c. 27. f. 16. 4. Inst. 568. 4. St. Tr. 214. 4. Com. 344.

(m) Keilway Sect. 4. Also it is (m) agreed, that justices in *eyre*, or of 159. 256. gaol-delivery, may order a jury to be returned immediately Crompton. for the trial of a prisoner arraigned before them. 152. 1. Siderfin 335. F. Inquest 55. Kelynge 7. C. Car. 315.

Also it is clearly (a) holden by Sir Edward Coke, and hath been often (b) adjudged, that justices of *oyer and terminer*, for the trial of any issue joined before them, might award a *venire* returnable the same day on which the party is arraigned.

2. Hale 261. Admitted 2. Keble 212. 292. 718. 2. Keble 433. 1. Siderfin 334. 1. R. Abr. 96. C. Car. 340. 583. Con. Keilway 159. Tr. per Pais 26. 2. R. Abr. 625. Sum. 266.

Also it is holden by Sir (c) Edward Coke, and hath been (d) adjudged, that justices of the peace may do the like; but there are very (e) strong authorities to the contrary; unless the crime amount (f) to felony, or the party (g) consent to be tried immediately.

common experience is so. (c) F. Corone 44. Keilway 159. 1. Jones 379. S. P. C. 136. 1. Keble 433. Tr. per Pais 25, 26. 2. Keble 212. Crom. 152. 1. Siderfin 99. 335. C. Car. 438. 448. 2. R. Abr. 625. Sum. 256. (f) 1. Sid. 335. In Crompton 150. it is said that the sessions for the peace may award process for the trial of an indictment of felony the next day after it is traversed. *Quære* if the party's being in gaol make no difference? C. Car. 340. 2. R. Abr. 96. 1. Sid. 335. (g) 1. Keble 433. 1. Siderfin 99. 334.

SECT. 5. *Quære* how far the law is altered as to these points by 4. and 5. Will. and Mary, c. 24. and 7. and 8. Will. 3. c. 32. which by requiring that jurors shall be summoned six days before they are to appear, seem to make it necessary whenever a (b) *venire* or particular precept is required for the return of a jury, (i) that there be six days between its *teste* and return.

SECT. 6. It hath been (k) adjudged, that a *venire* before justices of *oyer and terminer* returnable at a day certain is erroneous, unless the sessions appear to have been (l) adjourned to the same day; because otherwise it shall not be intended that their commission continued till such day; and if it did not, their authority to try the issue was determined. But it is admitted (m) that such *venire* may be made returnable at the next assizes, and then tried by virtue of (n) 1. Edw. 6. c. 7.

SECT. 7. It hath been (o) adjudged, that the award of a *venire* returnable at a certain day before justices of *oyer, &c.* need not expressly mention before what justices it shall be taken notice of, and it is there said, that the *venire* itself needs not shew before what justice it is returnable; but this seems not to be warranted by the book at large. Vide 2. Keble 855.

returnable;

(a) s. Leo. 110. Also it hath been (a) questioned, whether there can be Vide 7. and 8. any such process in informations *qui tam*, because the king Will 3. c. 31. is in some sort a party.

As to THE FIFTH POINT, viz. In what cases, and in what manner, a *tales* is grantable.

I shall observe the following particulars.

Sec. 11. FIRST, That if a full jury appear not in an appeal, whether by reason of the (b) death of some of the persons returned, or for any other cause, or if so many be (c) challenged and drawn that there do not remain enow to make a jury; or if after the jury is charged, one (d) or more of them die, the appellant (e) may pray a *tales*, in the same manner as a plaintiff in other actions. And so also may the appellee, if the appellant neglect to pray one the same (f) Term, &c. But it seems that a defendant cannot regularly pray it till there has been a default in the plaintiff.

(d) S. P. C. 155. 10. Coke 104. Sum. 257. 20. Ed. 3. 11. (e) 1. State Trials 302. and the books next above cited. (f) S. P. C. 155. 12. H. 4. 10. 10. Coke 104. *Quare* 2. Roll. Ab. 671. (g) Summary 257. S. P. C. 155. 14. H. 7. 7. (f) C. Car. 484. 14. H. 7. 7. 10. Coke 104. See the books cited to the precedent section, under the letter (d). Yet it is said in Dyer 359. that if a full jury doth not appear, and the plaintiff pray a *disfringas* without praying any *tales*, the Court ought to grant it at the prayer of the defendant. Vide 2. R. Ab. 671.

Sec. 12. SECONDLY, That in capital cases, a *tales* may be granted for a larger number than the first process, as for (g) 14. H. 7. 7. (g) sixty or forty, or any other even (h) number that the Court thinks proper, in order to prevent the delay which may be occasioned by the defendant's peremptory challenges. And in this respect the law in respect of a *tales* in capital cases is different from what it is in any other case; it being an allowed rule, that in all (i) other cases the *tales* must be for a less number than the first process.

15. Ed. 4. 33. 16. Edw. 4. 5. 10. Co. 104, 105. (h) 10. Coke 105. Finch of Law 414. But a *tales de circumstantibus* may be of any uncertain number, 10. Coke 105. (i) 14. H. 7. 7. Finch 414. 10. Coke 104, 105. 2. R. Ab. 672. 37. H. 6. 12. B. Octo Tales 11. 16. F. Inquest 20. 40. 18. Ed. 4. 6.

Sec. 13. THIRDLY, That every subsequent *tales*, in capital as well as in all (k) other cases, must be for a (l) less number than the former, except the former were quashed, in which (m) case the next may be for the same number.

(k) Finch 414. 2. R. Ab. 672. B. Octo Tales 15, 16. B. Attaint 7. 10. Coke 105. 47. Affize 10. 14. H. 7. 2. (l) S. P. C. 155. Summary 257. 2. Hale 266. Keilway 176. 10. Coke 105. F. Inquest 40. It is said that there may be 12 *tales*; but this is contrary to all the other books. (m) S. P. C. 155. Summary 257. F. Challenge 36. 20. H. 6. 38.

Sec. 14. FOURTHLY, That the quashing the array of the principal panel doth (n) not quash that of the *tales*; but

(n) F. Inquest 40. S. P. C. 155. Dyer 245. 10. Coke 104, 105.

the inquest shall be taken of those returned on the *tales* if there be enow, and if not, others shall be added to them by a new *tales*.

Yet it seems (a) agreed, that if all the persons returned (a) S. P. C. on a *habeas corpora* be challenged and drawn, there shall not be a *tales* awarded, but a new *venire facias*; for the word *tales* plainly refers to some others, to whom the persons returned are to be like. ^{155. Finch 414.}

Also it seems agreed, (b) that if the first *habeas corpora* be quashed, the *habeas corpora* with a *tales* cannot but be quashed with it, and the party must go on in the same manner as if the *venire* had been only returned, and nothing done upon it; for where a process is quashed, all that follows it and depends upon it, seems of course to fall with it. ^{(b) 34. H. 6. 20. F. Inquest 20.}

SECT. 15. FIFTHLY, That it seems the stronger opinion, that a *tales* is not grantable upon the return of a *venire*, but only (c) upon the return of a *habeas corpora* or *distringas*, because it appears not before such return but that a full jury may appear. ^{(c) Cro. Eliz. 502. 27. H. 6. 10. B. Nisi Prius 1.}

B. Oñt. Tales 1. 34. H. 6. 21. 2. R. Abr. 671. Cont. B. Oñt. Tales 10. 15. H. 7. 9.

SECT. 16. SIXTHLY, That the (d) *distringas* or (e) *habeas corpora*, with a command to add so many more to those summoned on the *venire*, is the first process against the *tales*; but it is (f) said not to be grantable with a *nisi prius*, without having been first returned into the court. ^{(d) 1. R. Abr. 798. (e) 27. H. 6. 10. B. Nisi Prius 1. Oñt. Tales 1. (f) 27. H. 6. 10. S. P. C. 157.}

B. Nisi Prius 1. Oñt. Tales 1. 1. H. 5. 11. S. P. C. 157.

SECT. 17. SEVENTHLY, That (g) if a juror be withdrawn after a trial is commenced whereon a *tales de circumstantibus* was awarded, and afterwards a new *habeas corpora* be taken out with a *tales*, it shall appoint such *tales* to be added to the jurors returned on the first *venire*, and also to those returned on the *tales de circumstantibus*; because the Court above will take judicial notice of what is done at *nisi prius* being entered on record. ^{(g) Cro. Jac. 677.}

SECT. 18. EIGHTHLY, That the (b) statutes which authorize justices of *nisi prius* to award a *tales de circumstantibus*, extend (i) as well as to all capital cases, whether of treason or felony, as to others. ^{(b) 35. H. 6. 6. f. 7. made perpetual by 2. and 3. Ed. 6. 32. 4. and 5. P. and M. 7. 5. Eliz. c. 25. 14. Eliz. c. 9. 7. & 8. Will. 3. c. 32. 3. Geo. 2. c. 24. Vide also 2. Sess. Caf. 333. 21. Viner 313. 3. Bac. Ab. 248. (i) Raym. 367. 1. Levinz 223. 1. Keble 490.}

1. Levinz 223. 1. Keble 490.

But

But it seems, that such a *tales* cannot be prayed for the king upon an indictment, or criminal information, without
 (a) 1. Levinz 223. a (*a*) warrant from THE ATTORNEY-GENERAL, or an express
 4. Comm. 365. (*b*) assignment from the Court before which the inquest is
 taken. But for the fuller understanding of these matters,
 (b) See the statute of 14. not being so proper for this treatise, I shall refer to the
 Eliz. c. 9. statutes in the margin.

(c) 4. Stat. Tr. 179 to 182. *Seff. 19.* NINTHLY, That it hath been (*c*) questioned
 whether any *tales* be grantable by justices of *oyer* and *terminer*;
 (d) 4. St. Tr. 179 to 182. and it hath been (*d*) holden, that it is not grantable by
 Yet there is justices of gaol-delivery; and therefore if a trial before such
 an instance in justices be put off for want of a sufficient number of jurors,
 Keilw. 176. it seems the usual practice for the Court not to order a *tales*,
 of the *tales* but a (*e*) larger panel, whereon the former jurors shall be
 awarded in an returned in the same order as before, and called to be sworn
 appeal before such justices. as they stand, without any more regard to those who were
 And the like sworn before than to the others (+). Which is the method
 was done likewise to be observed in the like case, (*f*) as to the swearing
 Plowden 100. of a jury returned with a *tales*.
 upon an indictment of murder. Vide 2. Hale 266. S. P. C. 155. Keilw. 176. Plowden 100.
 Jenk. 340. Foster 64. (*e*) 4. St. Tr. 179 to 182. (+) See Foster 63, 64. (*f*) Yel-
 version 23. It was agreed to be common practice on the Circuits, that if but one juror
 appears and he is challenged, there may be twelve talefmen sworn, who may try the
 cause. Sel. Cas. Evid. 110. 3. Bac. Ab. 249.

As to THE SIXTH POINT, *viz.* Where it is necessary to return a panel into court, before an inquest can be taken upon it, and where the prisoner may demand a copy of it.

Seff. 20. * It is recited by 42. Edw. 3. c. 11. "That divers mischiefs had happened, because the panels of inquests which had been taken before justices by writ of *scire facias*, and other writs, had not been returned before the sessions of the justices at the *nisi prius*, and otherwise, so that the parties could not have knowledge of the names of the persons which should pass in the inquest, whereby divers of the people had been dithered and oppressed; and thereupon it is ordained, "That no inquest (*g*) but affizes and deliverances
 (g) Note, that "of gaols be taken by writ of *nisi prius*, nor in any other
 6. H. 6. ch. 2. provides also "manner, at the suit of great or small, before the names of
 for affizes, "all them that shall pass in the inquest be returned in the
 3. Ind. 175: "court."

(b) S. P. C. 155, 157. *Seff. 21.* It seems (*b*) agreed, that this statute extends as well to writs of *nisi prius* in criminal cases as in civil, and to jurors returned upon a *tales* as well as to those returned upon a principal panel.
 Summarv 28. *quare*, If the statute extends to justices of *oyer* and *terminer*, for it is said to be the practice for trials before them for treason to be on the *venue*, and not to award any *habeas corpora*. 4. Stat. Trials 102.

Seff.

Sec. 22. But it seems, (a) that in trials before the justices of gaol-delivery the prisoner has no right to a copy of the panel before the time of his trial, except only in cases within the purview of 7. and 8. Will. 3. c. 3. which enacts, "That every person indicted and tried for high treason, or misprision thereof (except it be for counterfeiting the coin, &c.) shall have a copy of the panel of the jurors who are to try him, duly returned by the sheriff, and delivered unto him two days (b) at least before he shall be tried."

(a) 2. Stat. Tr. 762.
3. Stat. Tr. 866, 867.
4. Stat. Tr. 6.
(b) Vide ante ch. 39. f. 16. for an alteration in this respect.

Sec. 23. It hath been (c) adjudged to be sufficient, within the intent of this act, to deliver to a prisoner a copy of a panel arrayed by the sheriff before it is returned into court, if the very same panel be afterwards returned.

(c) Rookwood's Case, 4. Stat. Tr. 666.

† *Sec. 24.* It hath also been ruled, that if the panel returned by the sheriff be rendered insufficient, by challenges, as to the number of jurors, a new panel may be awarded.

Cooke's Case, 4. St. Tr. 743.

CHAPTER THE FORTY-SECOND.

BEFORE WHAT COURT

THE JURY

IS

TO BE RETURNED.

AND now I am to consider before what Court the process against jurors in criminal cases is returnable.

Sec. 1. There can be no (a) doubt but that, by the common law, it is returnable only into the court wherein the prosecution is depending. (a) 4. Inst. 159.

Sec. 2. But the statute of (b) Westminster the second, c. 30 having ordained, "that all pleas in either bench, which require only an easy examination, shall be determined in the country before the justices of assize, by virtue of the writ prescribed by that statute, commonly called the writ of *nisi prius*," it seems to have been universally agreed, (c) that an issue joined in the king's bench upon an (d) indictment or (e) appeal, whether for treason or (f) felony, or a crime of an inferior (g) nature, committed in a different county from that wherein the Court sits, may be tried in the proper county by writ of *nisi prius* by virtue of the said statute. (b) 2. Inst. 421, 423, 424. C. Car. 349. (c) 2. Inst. 424. 4. Inst. 160. See the books cited to the other parts of this section. (d) B. Corone 231. (e) 4. Coke 43. 4. Inst. 160.

Dyer 46. 21. H. 7. 34. Rastal 47. 55. Sup. c. 7. sect. 18. c. 23. sect. 146. (f) B. Corone 231. 4. Inst. 160. Raymond 367. (g) C. Car. 348, 349. 6. Mod. 246, 247. See 4. Comm. 341.

Sec. 3. Yet inasmuch as the king is not expressly named in this statute, and it is a general rule, that he shall not be bound by a statute which doth not expressly name him, it seems to have been generally held, that wherever the king is a party, it is irregular to grant a trial by *nisi prius* without his (b) special warrant, or the (c) assent of his attorney. (b) F. Nifi Prius 16. 2. Leonard 110. 2. Inst. 424. 1. N. B. 241. 4. Comm. 344. B. Nifi Prius 16. (c) 2. Inst. 424. F. N. B. 241. Cropleton Jur. 211. 6. Modern 246, 247. S. P. C. 16. Summary 258. In Cro. Car. 348, 349. in an indictment of barratry, which seemed to require great examination, the Court refused to grant a trial by *Nisi prius* at the motion of the Attorney-General, till the king by his letters had signified his pleasure that it should be so tried. Vide 6. Modern 123.

(a) ~~But not~~ But I do not find it denied, (a) but that regularly the Court may grant it in an appeal in the same manner as in any other action.

where the jury is to be from two counties, Dyer 46. See the books cited to the precedent section under letter (c).

(b) Chap. 7. Sect. 4. Having shewn already (b), that justices of n/s f. 17, 28, and prius have power by 14. Hen. 6. c. 1. to give judgment in felony and treason, and how far they have power to give

(c) Ch. 25. damages in an appeal, and having also shewn (c) in what cases they may arraign an appellee at the suit of the king, after a nonsuit of the party, I shall refer to what is there said concerning these matters.

CHAPTER THE FORTY-THIRD,

OF

C H A L L E N G E S.

AND now I am to shew in what manner the jurors returned for the trial of a criminal may be challenged.

I shall consider this subject so far as it relates,

1. To all persons in general.
2. With regard to aliens only.

As to the learning of this kind, so far as it relates to all persons in general.

Sec. 1. Having premised, that no challenge (*a*) can be taken, either to THE ARRAY or to THE POLLS, till a full jury have appeared, and that no juror can be (*b*) challenged either by the king or prisoner, without (*c*) consent, after he hath been sworn, whether on the same day, or, according to the greater number of (*d*) authorities, on a former, on the same trial, unless it be for some cause which happened (*e*) since he was sworn :

(*a*) Hobart 215.
 (*b*) Yelver. 23.
 C. Car. 291.
 Co. Litt. 156.
 2. Inst. 434.
 22. Edw. 3.
 2. R. Abr. 658, 659, 661.
 12. H. 4. 10. F. Chall. 64. 14. H. 7. 6. B. Chall. 73. 9. H. 5. 7. Ab. F. Challenge 2. B. Challenge 50. 14. H. 7. 19. Ab. F. Chal. 75. 3. State Trials 379. Whether can a challenge be taken to the array after any of the jurors are sworn, Hob. 35. (*c*) Cro. Car. 291. 3. State Trials 379. (*d*) 22. Edw. 3. 8. 2 R. Ab. 658, 659, 661. 12. H. 4. 10. 14. H. 7. 6. B. Challenge 50, 53, 130. F. Challenge 143. 28. Affize 44. Yelver. 23. Act adjudged, that a juror after he is sworn may be peremptorily challenge another day, though not on the same whereju he is sworn. 32. H. 6. 26. Ab. B. Challenge 193. 14. H. 7. 19. Ab. Challenge 75. S. F. C. 1. 8. 1. Rich. 3. 19. Ab. B. Challenge 194. (*e*) 22. Edw. 3. 8. Yelverton 23. 2. R. Ab. 658. B. Challenge 130. 28. Affize 44. Co. Litt. 158. 14. H. 7. 6. B Challenge 50, 73, 75. F. Challenge 64. 72. 143. 2. Hale 270.

I shall endeavour to shew,

1. How jurors may be challenged on the part of the king.
2. How on the part of the prisoner.

AND FIRST, *viz.* How jurors may be challenged on the part of the king.

Sec. 2. It seems (a) agreed, that by the common law the king might challenge peremptorily as many as he thought fit, of any jury returned to try any cause in which he was a party.

(a) Co Lit.
156.
S. P. C. 162
1. R. Ab. 645.
4. Comm. 347.

But this is remedied by 33. Edw. 1. commonly called An Ordinance for Inquests, which enacts as followeth “ if in-
“ quests to be taken before any of the justices, and wherein
“ our lord the king is party, howsoever it be, it is agreed
“ and ordained by the king and all his council, that from
“ henceforth, notwithstanding it be alledged, by them that
“ sue for the king, that the jurors of these inquests, or
“ some of them, be not indifferent for the king, yet such
“ inquests shall not remain untaken for that cause, but
“ if they that sue for the king will challenge any of those
“ jurors, they shall assign of their challenge a cause certain,
“ and the truth of the same challenge shall be inquired of
“ according to the custom of the court.”

(b) Moor
591.
S. P. C. 162.
Summary 259
Co Litt. 159.
and the books
cite to
other parts of
this section.
Yet peremp-
torily chal-
lenges were
taken for the
queen in

Sec. 3. It seems to be clearly settled (b) at this day, that this statute, being general, extends as well to all criminal cases as civil. However, if the king challenge a juror before a panel is returned, it is (c) agreed that he need not shew any cause of his challenge till the whole panel be gone through, and it appear that there will no be a full jury without the person so challenged. And if the defendant, in order to oblige the king to shew cause, presently challenge *tous premiers*, (d), yet it hath been adjudged that the defendant shall be first put to shew all his cause, of challenge, before the king need to shew any.

Throckmorton's trial, 1 Mar 1 State Trials 18 (c) 1 Ventris 309, 310 S. P. C. 162. 2. State Trials 744 3 State Trials 567 Skinner 42 Summary 259 2. Hale 271 4 Comm 347. (d) State Trials 5.. Raym 473, 474. Skinner 82. See 3. State Trials 4. 4. State Trials 177 407.

As to THE SECOND POINT, *viz.* How jurors may be challenged on the part of the prisoner.

Sec. 1. Having premised that a (c) peer can take no

challenge to any of his peers, and that where several are tried on a joint (f) *venue*, a juror challenged and drawn as to one, cannot but be drawn as to all, + and that by 24 Geo. 2. c. 18. “ No challenge shall be taken by a peer,

1. R. Ab. 621.

Co Litt. 156.

1. State Tr.

156. 161.

1. R. per Paine 9.

1. R. per Paine 9.

1. R. per Paine 9.

2. Hale 271 (f) Sup. c. 41 sect 9. Strange 1023. Rex v. B. of Worcester, K. B. Mich 33. Geo. 2. 3. Comm 359.

or

“ or lord of parliament, to any panel of jurors for want
 “ of a knight’s being returned in such panel, nor any ar-
 “ ray quashed by reason of any such challenge taken after
 “ that time ;”

I shall farther endeavour to shew,

1. How jurors may be challenged *peremptorily* ;

2. How they may be challenged *for cause*.

As to the first particular, *viz.* How jurors may be chal-
 lenged *peremptorily* :

Having premised that the prisoner must take all such
 challenges himself, (a) even in such cases wherein he may
 have counsel; † and also that before any juryman is brought
 to the book, the prisoner by leave of the Court may have
 the whole panel once called over in his hearing, that he
 may take notice who do and who do not appear, in order
 the better to enable him to take his challenges ,

(a) 4. Stage
 Trials 205.
 1. State Tr.
 601.
 2. State Trials
 743, 744.
 Layer’s Case,
 6. St. Tr. 245.
 Townley’s
 Case, Foster
 7. 63.

I shall endeavour to shew,

1. In what cases a *peremptory* challenge is allowable.

2. How many jurors may be so challenged.

Asto the first particular, *viz.* In what cases a *peremptory*
challenge is allowable.

Self. 5. I take it to be agreed, that a *peremptory* chal-
 lenge was allowable by the common law in all (b) capital
 cases both upon indictments and (c) appeals, and also in
 (d) misprison of high treason.

(b) Co. Litt,
 156.
 Moor 12.
 (c) Moor 12.
 Bendl. 42.
 (d) B. Chall. 74. 75.
 2. Stage
 Trials 254.

9. H. 5. 7. Ab. F. Challenge 22. B. Challenge 57. 14. H. 7. 7. B. Chall. 74. 75.
 211. 3. H. 7. 2. (a) 3. Inst. 27. But in no other case that is not capital, 2. Stage
 Trials 254.

But it was enacted by 33. Hen. 8. c. 23. f. 3. “ That
 “ it should not be allowed in any cases of high treason, or
 “ misprison of high treason.” Nor do I know that any sta-
 tute hath revived it to the latter of these ; for it is said, that
 the statute of 1. Philip and Mary, c. 10. which, by re-
 storing

(a) 3. Inf. storing the old course of the common law as to trials of treason, has revived (a) such challenges as to treason, doth not (b) extend to imprisonment of high treason.

2. Anderson

107, 108 Co. Litt. 156. 2. State Trials 764, &c. But this is made a *quære* Savil 57. (b) Sup. c. 25. sect. 145. 4. Com. 347. Yet 3. Inf. 27. a. it is said, that for imprisonment of treason one may peremptorily challenge 35.

(c) F. Chal.

153. 165. Sect. 6. It hath been anciently (c) adjudged, and is

(d) S. P. C.

163. Yet the same point is made a *quære* lawry for a capital crime, as he may on the general issue :

S. P. C. 158.

(e) Co. Litt. 157. But the contrary is holden by (f) Hale, and is said to have been (g) adjudged in the case of *Okey* and *Berkstead* (1).

(f) Sum. 259.

2. Hale 267. (g) 1. Lev. 61. But the other books which report the same case take no notice of this point. 1. Siderfin 7. Kelynge 13. (1) Charles Ratcliffe had been convicted of high treason ; and in B. R. Mich. 20. Geo. 2. upon a collateral issue that he was not the same person, a peremptory challenge was insisted on, and refused by *Chief Justice Lee*. 1. Black. 4. 6.—Vide Foster 41. Johnson's Case, *ibid.* 46. and Bargarve's Co. Litt. 157. note 8.

As to the second particular, *viz.* How many jurors may be challenged peremptorily.

(b) Co. Litt.

156.

Crompt. 174.

9. H. 5. 7.

14. H. 7. 7.

B. Chall. 70.

74. 75. 217.

19. E. 4. 13.

3. H. 7. 2.

Ab. B. Chall. 211.

17. Affize 6.

17. Edw. 3. 23.

Ab. B. Chall. 105.

Trial per Pais c. 9.

S. P. C. 157, 158.

See the books cited c. 30. sect. 2.

Lamb. b. 4. c. 14.

says, that it was doubtful at common law how many might be challenged.

(f) Sup. c. 30. sect. 2.

Sect. 7. It seems to have been the settled (b) rule of the common law, wherever such challenge was allowed, to suffer the prisoner to challenge as many as he thought fit under the number of three full juries, *i. e.* not amounting to more than thirty-five. But if a criminal challenge more than that number, (i) it seems the more prevailing opinion, that he is to be dealt with as one that stands mute.

Sect. 8. By 22. Hen. 8. c. 14. f. 7. made perpetual by 32. Hen. 8. c. 3. "No person arraigned for any petit treason, murder or felony, shall be admitted to any peremptory challenge above the number of twenty." But it seems (k) agreed, that 1. and 2. Philip and Mary, c. 10. which restores the course of the common law as to trials of treason, has revived the old challenge of thirty-five in trials of petit treason.

(k) B. Chall.

157.

Hale 260.

3. Inf. 227.

Vide supra

sect. 3. and

c. 25. f. 132.

144. S. P. C. 158.

Co. Litt. 156.

Sec. 9. It seems to have been holden by *Sir (a) Ed. (a) 1. Inst.* *ward Coke*, that he who challenges more than twenty up-^{227.} on an arraignment of felony, since the abovementioned sta-^{4. Comm. 348.} tute of 22. Hen. 8. shall *(b)* neither forfeit his goods, nor ^{(b) Vide c. 30.} have judgment of death, nor of *pain forte et dure*, but shall ^{sect. 19.} only be over-ruled as to his challenges so far as they ex-^{46.} ceed twenty, and put upon his trial. But this seems to ^{(c) Sup. 260.} have been doubted by *Sir Matthew (c) Hale*, and the con-^{Sed vide} trary is holden by *(d) Cromptor*, and seems more agreeable ^{2. Hale 270.} to the most natural construction of 22. Hen. 8. which seems ^{343 399.} to have intended no alteration as to the nature or effect of ^{(d) Cromptor 214.} peremptory challenges, but only as to their number. To ^{(e) Sup. c. 33.} which may be added, that nothing is more common than ^{lect. 32. 45.} for *(e)* subsequent statutes, which take from felons the ^{48. 59. 64. 66.} benefit of clergy, *(f)* expressly to exclude those who ^{69. 82.} challenge more than twenty, which would be needless if ^{(f) Vide sup.} then challenge were only to be over-ruled, and did not ^{c. 33. lect. 27.} subject them to judgment of *(g)* death, &c. ^{36.}

(g) Vide c. 33. sect. 20. The words of the statute are, “that he be not admitted to challenge, &c.” the evident construction of which is, that any further challenge shall be disallowed or prevented, and being null from the beginning and never in fact a challenge, it can subject the prisoner to no punishment, but the juror shall be regularly sworn ^{11. Coke 38.} ^{32. 35.} ^{S. P. C. 126.} ^{4. Comm. 343.}

As to the second particular, *viz.* How jurors may be challenged for cause.

Sec. 10. Having premised, that it is a *(b)* general rule, ^{(b) Co. Lit.} that wherever *(1)* the king is a party, as he is in every ^{158.} indictment, and in some sort also in *(1)* appeals of felony, ^{F. Chall. 128.} he who takes a challenge for cause must shew it presently, ^{3. Stat. T. 121.} and shall not have time till the panel is perused, as the king ^{135.} shall where he takes a challenge, as hath been more fully ^{S. P. C. 162.} shewn, sect. 3, and having also farther premised, that after a ^{2. R. Ab. 659.} prisoner hath challenged a juror for cause, and his cause ^{38. Aff. 22.} hath been disallowed, or found against him, he may ^{1. Siderfin} challenge the same juror peremptorily, before he is ^{244.} sworn, ^{Cont. 19. Aff.} ^{size 6.} ^{Ab. B. Chall.} ^{107.}

(1) Except in inquests, F. Challenge 105. 107. ^{2. R. Ab. 659, 660.} ^{(2) That} cause must be shewn presently on indictments, ^{1. Siderfin 244.} ^{Coke Litt. 158.} ^{1. H. 5. 1.} ^{Ab. F. Challenge 70.} ^{Skinner 82.} ^{(3) That cause must be shewn pre-} sently in appeals, ^{Coke Litt. 158.} This is left a *quære* ^{S. P. C. 162.} ^{(m) Coke} ^{Litt. 158.} ^{37. H. 6. 8.} ^{Ab. F. Challenge 48.} ^{B. Challenge 86.} ^{Cont. 10. H. 4. 3.} ^{Ab. F. Challenge 180.} ^{(n) Vide sup. lect. 1.}

I shall endeavour to shew,

1. What shall be a good challenge of a juror, in respect of his honour or insufficiency.

2. What in respect of his indifferency.

AND FIRST, As to the challenge of a juror for his honour or insufficiency.

Having premised, that it is agreed to be a good challenge of this kind that a juror is an (a) alien, (b) a minor, or a (c) villain;
 (a) Co. Litt. 156.
 Thelcol. b. 1. villain;
 ch. 6. sect. 14.
 14. H. 4. 19. B. Challenge 48. F. Challenge 91. 2. R. Ab. 656. Calvin's case 15. b. (2) Coke Litt. 157. 172. Litt. sect. 259. Vide 7. & 8. Will. 3. c. 32. (c) 2. R. Ab. 657. Co. Litt. 156. 9. Edw. 4. 16. 26. Affize 28. F. Chall. 135. B. Challenge 64. 118. But the contrary is holden in the Year-Book of 10. H. 7. 20. Ab. B. Challenge 220. and a *quære* by the reporter and Brook.

I shall more fully endeavour to shew,

1. Where peerage is a good cause of challenge.
2. Where the want of freehold is a good cause of challenge.
3. Where infamy is a good cause of challenge.
4. Whether old age, sickness, or non-residence in the county, be, in any case, a good cause of challenge.

As to the first particular, *viz.* Where peerage is a good cause of challenge.

Sett. 11. It is (d) agreed, that if a peer be returned on a jury and bring a writ of privilege, he shall be discharged. (d) 48. Affize 6. Ed. 3. 30. Also it seems to have been (e) holden, that even without such a writ he may either challenge himself, or be challenged by the party. *Quære.*
 B. Chall. 12. 30. 469. Dyer 314. 15. H. 6. 46. Moon 767. Reg. 179. F. N. B. 165. (e) 27. E. 3. 18. F. Chall. 119. 2. R. Ab. 646. but his notes are not warranted by the books at large. Co. Litt. 157. 9. Coke 49. 27. H. 8. 22. Con. 35. H. 6. 46. B. Challenge 8. Finch 506. 6. Coke 53. F. Challenge 44. 1. Jones 153. F. N. B. 166. Vide 3. Bac. Ab. 260.

As to the second particular, *viz.* Where the want of freehold is a good cause of challenge.

Sett. 12. At the common law there was no (f) necessity that jurors should have any freehold as to inquests before justices *in eyre*, or in cities or burghs, as hath been more fully shewn, chap. 25. sect. 21.
 (f) Admitted by the statute of 21. Edw. 1. *de bl. qui po. iurari sunt in eyris*, and by the Register. Vide Raymond 485, 485. 1. Ventris 366. *Infra* sect. 41.

Also

Also it seems (a) agreed, that the common law doth not (a) *Keilw. 46.* require that a juror should in any case have a freehold of *344. 92.* any certain value; and upon this ground it hath been ad- *G. Eliz. 413.* judged, that a freehold worth but (b) twenty shillings or *See the cita-* (c) five shillings, or even a (d) penny, is still a sufficient *tions as the* qualification for a juror in such cases as are not within the *next three* statutes which require a freehold of a greater value. *letters, Litt. 127. 464. and 2. R. Ab. 647, 848.*

(b) 10. H. 6. 7. Ab. F. Chall. 29. B. Chall. 189. 19. H. 6. 9. Ab. F. Chall. 32. B. Challenge 60. 2. H. 7. 13. B. Challenge 152. 10. H. 6. 18. B. Chall. 292. (c) 3. H. 4. 4. Ab. F. Chall. 78. B. Chall. 32. (d) *Keilw. 46.*

Also it hath been (e) adjudged, that the common law (e) 28. *Ad.* did not require that a juror should in any case have any *15.* freehold. *Ab. B. Chall. 106.*

3. State Trials 135 to 140. Vide 16. H. 7. 14. 7. H. 6. 44. Ab. F. Chall. 24. B. Chall. 57. It seems to be holden, that by the common law it is a challenge only to the favour. *10. H. 7. 13. 3. H. 4. 4. Ab. F. Chall. 24. B. Challenge 78.*

But this is not only contrary to what seems implied by all the authorities above cited, which, in saying that the common law did not require a freehold of any certain value, plainly seem to suppose that it required some freehold, but it hath been also contradicted by many express (f) *Cro. Eliz. 413.* authorities; agreeably to which it seems to be (g) settled at this *Trial per Pais c. 9.* day, that the want of freehold is a good challenge of a juror in all cases not otherwise provided for by (h) statute, and consequently in a trial for high treason in *London*, as well as in any other county. *3. H. 4. 4. Ab. F. Challenge 78. B. Challenge 32.*

4. H. 4. 1. Vide *Keilw. 54. Coke Litt. 156, 157. 2. R. Ab. 647. 7. H. 4. 1. Ab. B. Challenge 34. F. Challenge 58. 21. H. 7. 29. Ab. B. Chall. 90. 10. H. 7. 11.* It seems taken for granted that issues in all cases are to be returned upon jurors, by which it seems to be implied that they ought to have land, &c. (g) 3. State Trials 869. 4. State Trials 374. 6. State Tr. 58. 243. (h) Vide *infra* sect. 19, &c.

Sec. 13. But it seems agreed, that wherever the letter of the common or statute law requires that a juror should have a freehold, the meaning is fully satisfied by his having the (i) use of a freehold, and that it is not material whether he hath it in his own or his (k) wife's right, or whether it be (l) absolute or upon condition, or an estate of inheritance, or only (m) for term of one's own or another's life, so that it be in the same (n) county, wherein the suit *(i) Keilw. 46. 92. Dyer 9. F. Chall. 27. 13. H. 7. 7. 6. Edw. 4. 7. B. Chall. 165. Co. Litt. 272.*

Plow. 58. 15. H. 7. 13. S. P. C. 160. B. Jurors 24. (k) F. Chall. 27. 9. H. 7. 1. B. Chall. 157. 12. H. 7. 4. B. Chall. 160. Co. Litt. 156. (l) Co. Litt. 156. Keilw. 167, 168. 2. R. Ab. 648. Con. 7. H. 4. 1. F. Chall. 158. But Bro. in abridging this case in title Challenge 53. says quod mirum. (m) 9. H. 7. 1. 12. H. 7. 4. B. Chall. 160. Co. Litt. 156. B. Chall. 157. See F. N. B. 24. 26. (n) 9. H. 7. 1. B. Chall. 157. Co. Litt. 157. Rastal 18. 19. H. 6. 9.

(a) 12. H. 7. is brought, and actually continued in the juror (a) till the time when he is sworn.

B. Chall. 106.

Coke Litt. 157. 7. H. 4. 1. Ab. F. Challenge 158.

(b) Vide c. 25.
1. 21, 22, 30.

Sett. 14. By the (b) statutes of Westminster the second, c. 38. and 21. Edw. 1. *de his qui ponendi sunt in assise*, "None shall be put in assizes or juries, except in cities, burghs, or trading towns, who have not tenements to the yearly value of forty shillings, &c."

(c) 2. Inst.

448.

28. Affize 15.

Ab. B. Chall.

206.

3. H. 4. 4.

Ab. B. Chall.

32. F. Chall.

But it seems to have been (c) generally agreed, that a juror can neither be challenged by the parties for being returned contrary to these acts, nor alledge such matter himself for his discharge, but must take his remedy by action against the sheriff, or by *writ of privilege* for his discharge.

78. F. N. B. 166. 2. St. Tr. 744. But 38. Affize 19. is contrary.

(1) Extended
by 17. Eliz.
c. 4 to 41.

Sett. 15. By 2. Hen. 5. c. 3. "No person shall be admitted to pass in any inquest upon trial of the death of a man, nor in any inquest betwixt party or party in plea real, nor in plea personal, whereof the debt or the damage declared amount to forty marks, if the same person have not lands or tenements of the yearly value of forty shillings (1) above all charges of the same; so that it be challenged by the party, that any such person so inquired in the same cases, hath not lands or tenements of the yearly value of forty shillings above the charges as afore is said."

(d) Keilw. 92.

26. H. 7. 14.

2. R. Ab.

647; 648.

(e) C. Eliz.

413.

Rumf. 455.

546.

Sett. 16. It hath been (d) adjudged, that this statute extends as well to a collateral issue, as to the general one, but not to an indictment or information for a crime not (e) capital; for the words are, "upon trial of the death of a man, nor in any inquest between party and party in plea real or personal, &c."

(f) Vide sup.

1. 13.

(g) Keilway

92. and B.

Chall. 207.

Jurors 14.

in an abridg-

ment of the

Year-Book

of 15. H. 7.

25. pl. 7.

But I do not

find this point

in the book

19. H. 6. 9.

Sett. 17. It seems (f) agreed, that *cessus que use* of any freehold in the same county of the yearly value of forty shillings is a good juror within this statute. And some have (g) holden, that the law is the same as to a feoffee of such land in trust for another, or a (h) remainder-man of a state of freehold expectant on a release for years. But this seems not to be maintainable, because the statute, in requiring that a juror shall have lands of the yearly value of forty shillings above all charges, plainly seems to intend that he ought to have lands of the clear (i) income whereof at the time he

is large. (h) Keilway 168 (i) Vide Keilw 92. 18. 1. dw 4. 23. F. Chall. 321 36. H. 6. 23. 2. R. Ab. 647; 648, 649.

can expend so much ; but a man cannot expend any thing out of lands whereof he is enfeoffed to the use of another, or wherein he has only a dry remainder.

Stat. 18. It hath been (*a*) adjudged, that this statute is (*a*) 3. Ed. 1. repealed as to treasons by 1. (*b*) & 2. Philip & Mary, c. 10. 135 to 140. which enacts, " that all trials for treason shall be according (*b*) Vide c. 25. 1. 132. 142, " to the common law." 143, 144.

Stat. 19. By 23. Hen. 8. c. 13. it is recited, " That trials of murders and felonies in cities, boroughs, and towns corporate within this realm having authority to proceed in the deliverance of such offenders, had been oftentimes deferred and delayed, by reason of challenge of such offenders, for lack of sufficiency of freehold, to the great hinderance of justice ;" and thereupon it is enacted, " That every person and persons being the king's natural subject born, which either by the name of a citizen, or of a freeman, or any other name, doth enjoy and use the liberties and privileges of any city, borough or town corporate where he dwelleth or maketh his abode, being worth in moveable goods and substance to the clear value of forty pounds, be admitted in trial of murders and felonies in every sessions and gaol-delivery, to be kept and holden in and for the liberty of such cities, boroughs and towns corporate, albeit they have no freehold ; any act, statute, use, custom or ordinance to the contrary hereof notwithstanding."

Stat. 20. " Provided that this act no way extend to any knight or esquire dwelling, abiding, or resorting in or to any such city, &c."

Stat. 21. By 11. Hen. 7. c. 21. and 4. Hen. 8. c. 3. Vide 1. Rich. special provision is also made for jurors in London in real 3. c. 4. and personal actions above the value of forty marks, for 27. Eliz. c. 6. which I shall refer to the statutes at large.

Stat. 22. By 4. and 5. Will. and Mary, c. 24. " All jurors (other than strangers upon trials *per medietatem linguæ*) who are to be returned for trials of issues joined, in any of the courts of king's bench, common pleas or exchequer, or before justices of assize or *nisi prius*, *oyer and terminer*, gaol-delivery, or general quarter-sessions of the peace in a ny countrey of this realm of England, shall every of them have in their own name, or in trust for See Town-ley's Case, Foster 7. that if a juror have freehold and copyhold which together amount to 10l. a-year it is sufficient.

" them,

“ them, within the same county, ten pounds by the year
 “ at least above reprises, of freehold or copyhold lands or
 (a) But by the common law a freehold in ancient demesne was not sufficient.
 9. H. 7. 1.
 B. Chall. 137.
 Co. Litt. 156.
 “ tenements, or of lands or tenements of ancient (a) demesne, or in rents, or in all or any of the said lands, tenements or rents, in fee-simple, fee-tail, or for the life of themselves or some other person, and that in every county in Wales, (1) every such juror shall have in the same county six pounds by the year at least, in manner aforesaid, above reprises.”

(1) This is the first time that copyholders (as such) were admitted to serve upon juries in any of the king's courts, though they had before been admitted to serve in some of the sheriff's courts, by 1 Rich. 3 c. 4. and 9. Hen. 8. c. 13.

Stat. 23. But by 4. and 5. Will and Mary, c. 24. it is provided, “ That it shall be lawful to return any person on
 “ a tales in England who shall have five pounds by the
 “ year, or in Wales who shall have three pounds by the
 “ year in manner aforesaid.”

(b) Vide s. 12. and there is the like exception in 27. Eliz. c. 6. s. 7 and in 16. & 17. Car. 2. c. 3. s. 4.
 Stat. 24. Also there is a saving to “ all (b) cities, boroughs and towns corporate, of their ancient usage of returning jurors of such estate, and in such manner as before had been used and accustomed.” But there is no express saving of any trial contrary to the purview of this statute and made good by some other, and therefore it may be argued, that the trial of felonies in towns by jurors worth Forty pounds in goods by virtue of the above-cited statute of 23. Hen. 8. is no longer lawful, it not being a trial by usage, but by statute. Yet seeing 4. & 5. Will and Mary seems plainly to have a view to trials in counties only, and the statute of 16. & 17. Car. 2 c. 3 which is penned almost in the very same words, was taken (c) no way to alter the former method of trials in towns, lest it should cause a failure of justice, and it being generally impracticable to get a sufficient number of such freeholders as the statute requires in towns, it seems a reasonable construction of 4. & 5. Will. and Mary that the trial by 23. Hen. 8. still continues lawful as before.

(d) 4. St Tr. 186. and in Francis's Trial.
 But it hath been (d) agreed, that for trials in London for high treason, every juror ought to have such freehold or copyhold as is required by 4. & 5. Will and Mary.

Vide 3. Comp. 363.
 † By 3. Geo. 2. c. 24. s. 18. made perpetual by 6. Geo. 2. c. 37. “ Any person having an estate in possession in land in their own right, of the yearly value of twenty pounds or upwards over and above the reserved rent payable thereout, such lands being held by lease or leases for the
 “ absolute

" absolute term of five hundred-years or more, or for
 " ninety-nine years, or any other term determinable on
 " one or more life or lives, the name of every such person
 " shall and may and is hereby directed and required to be
 " inserted in the lists (in the manner directed by 7. &
 " 8. Will. 3. c. 32. and 3. & 4. Ann. c. 18.) in order to
 " their being inserted in the freeholders book, and the per-
 " sons appointed to make such lists are hereby directed to
 " insert them accordingly ; and such leaseholder or lease-
 " holders shall and may be summoned to serve on juries in
 " like manner as freeholders may be summoned and im-
 " panned to serve on juries by virtue of this or any other
 " act or acts of parliament for that purpose, and be sub-
 " ject to the like penalties for non-appearance."

† By 3. Geo. 2. c. 25. s. 19. " The sheriffs of the city
 " of *London* shall not impanel or return any person or
 " persons to try any issue joined in any of his majesty's
 " courts of king's bench, common pleas, and exchequer,
 " or to be or serve on any jury at the sessions of *oyer* and
 " *terminer*, gaol-delivery, or sessions of the peace, to be
 " had or held for the said city of *London*, who shall not be
 " an householder within the said city, and have lands,
 " tenements, or personal estate to the value of one hun-
 " dred pounds ; and the same matter and cause alledged by
 " way of challenge, and so found, shall be admitted and
 " taken as a principal challenge, and the person or persons
 " so challenged shall and may be examined on oath of the
 " truth of the said matter."

† By 3. Geo. 2. c. 25. s. 20. " The sheriffs or other
 " officers to whom the returning of juries doth and shall
 " belong, for any county, city or place respectively, shall
 " not impanel or return any person or persons to serve on
 " any jury for the trial of any capital offence, who at the
 " time of such return would not be qualified in such re-
 " spective county, city or place to serve as jurors in civil
 " causes (2) for that purpose ; and the same matter and
 " cause alledged by way of challenge, and so found, shall be
 " admitted and taken as a principal challenge, and the per-
 " son or persons so challenged shall and may be examined
 " on oath of the truth of the said matter."

(2) For the qualifications of jurors in civil causes, vide sup. 4. and 5. Will. and Mary, c. 24. and 3. Geo. 2. c. 24. sect. 18.

† By 4. Geo. 2. c. 7. s. 3. made perpetual by 6. Geo. 2. c. 37. it is recited, that by the very frequent occasions there are for juries in *Middlesex* and by the small number of free-
 holders

holders that are in the said county the sheriffs may under difficulties of procuring juries, it is therefore enacted, "That all leaseholders upon leases where the improved rents or value shall amount to fifty pounds *per annum* or upwards over and above all ground rents, or other reservations payable by virtue of the said leases, shall be liable and obliged to serve upon juries when they shall be legally summoned for that purpose."

As to the third particular, *viz.* Where infamy is a good cause of challenge.

Sett. 25. It seems, that it is a good challenge of a juror that he is (a) outlawed, or that he hath been (b) adjudged to any corporal punishment whereby he becomes infamous, or that he hath been convicted of treason, or (c) felony, or (d) perjury, or (e) conspiracy, or of (f) forgery on 5. Eliz. c. 14. or attainted in an (g) attainr for giving a false verdict. And it hath been (b) holden, that such exceptions are not saved by a pardon. And it was anciently (i) holden, that excommunication was also a good challenge. Yet it (k) seems, that none of the above-cited challenges are principal ones, but only to the favour, unless the record of the outlawry, judgment, or conviction be produced, if it be a record of another court, or the Term, &c. be shewn, if it be a record of the same court.

(a) Co. Litt. 158. 21. H. 6. 30. 21. H. 4. 41. B. Indict. 2. 2. R. Ab. 657. B. Chall. 64. F. Process 208. C. Car. 134. Trial per Pais c. 9. (b) Co. Litt. 6. 156. Trial per Pais c. 9. (c) Co. Litt. 6. 158. 2. Bullst. 154. 2. St. Tr. 571 to 524. Trial per Pais c. 9. Con. 1. Lev. 263. (d) Bracton lib. 4. c. 19. sect. 2. Fleta lib. 4. c. 8. sect. 2. Trial per Pais c. 9. (e) See B. 1. c. 72. sect. 9. Co. Litt. 6. 158. It seems to be holden, that the conviction for conspiracy ought to be at the king's suit. But 23. H. 6. 55. B. Challenge 15. F. Challenge 41. make no such distinction. (f) Coke Litt. 6. and the reason seems to be, because the statute is express, that the offender shall be set on the pillory, &c. But it was adjudged, 33 H. 6. 55. Ab. F. Chall. 41. F. Chall. 15. 2 R. Ab. 649. that a conviction on 7. H. 5. 3. was not a good challenge to a juror, because it was not a conviction on an action at the common law. Vide 44. Edw. 3. 39. F. Dec. tant. 11, 12. (g) See the authorities under the preceding letter (h) 1. State Trials 221 to 524. 2. Bullstrode 154. 2. Hale 278. 431 c. 37. sect. 48 to 53. (i) Co. Litt. 155. (j) Co. Litt. 157. 33. H. 6. 55. 43. Aff. 20 45. 20 H. 5. 11. 21. Edw. 4. 74. 2. R. Abr 649, 650. 658. 33. H. 6. 1. B. Chall. 15. 247. 4. Comm. 363.

As to the fourth particular, *viz.* Whether old age, or sickness, or non-residence in the county, be in any case a good cause of challenge of a juror.

Sett. 26. I take it to be agreed, that notwithstanding the (1) statute of Westminster 2. c. 38. be express, "that neither old men above the age of seventy years, nor persons perpetually sick, nor those who are infirm at the time of their summons, nor those who do not reside in
" the

"the county, shall be put in juries, or in the lesser assizes;" and that therefore such persons may sue out a writ of *(a)* privilege for their discharge, grounded on this statute; yet if they be *(b)* actually returned and appear, they can neither be challenged by the party, nor excuse themselves from not serving if there be not enow without them. *(a)* F. N. B. 165, 166. *(b)* 2. State Trials 744. 2. Inst. 448.

By 7. and 8. Will. 3. c. 32. Infants under twenty-one are exempted from juries. 4. Comm. 364.

As to THE SECOND POINT, viz. What shall be a good challenge of a juror in respect of his indifferency.

Sett. 27. It is expressly enacted by 25. Edw. 3. c. 3. which seems to have been made in *(c)* affirmance of the common law, "That no indictor shall be put in inquests upon deliverance of the indictors of felonies or *(d)* trespasss, if he be challenged for that same cause by him which is so indicted." And this exception against a juror, that he hath found an indictment against the party for the same cause, hath been adjudged good, not only upon the trial of such indictment, but also upon the trial of another indictment or action *(f)* wherein the same matter is either in question, or happens to be material, though not directly in issue. *(c)* 12. Aff. 19. Affize 6. B. Chall. 107. 107. S. P. C. 153. *(d)* Yet in 7. Edw. 4. 4. Ab. B. Chall. 166. F. Chall. 53. it is holden to be no principal Challenge in trespasss. *(e)* 2. State Trials 379. 4. State Trials 186. In the Year-Book of 40. Affize 10. Ab. B. Chall. 142. an indictor being returned on the petit jury and giving a verdict, was fined because he did not challenge himself. Yet 27. Affize 13. Ab. B. Challenge 120. and F. Challenge 137. it is not allowed to be a principal Challenge, even upon the trial of the same indictment. *(f)* 8. H. 4. 2. Ab. B. Chall. 42. F. Chall. 79. Co. Litt. 157. 1. Siderfin 244. 2. R. Ab. 649.

Sett. 28. It hath been allowed a good cause of challenge on the part of the prisoner, that the juror *(g)* hath a claim to the forfeiture which shall be caused by the party's attainer or conviction; or that he hath declared his opinion before-hand that the party is guilty, or will be hanged, or the like. Yet it hath been *(i)* adjudged, that if it shall appear that the juror made such declaration from his knowledge of the cause, and not out of any ill-will to the party, it is no cause of challenge. *(g)* 1. St. T. 93. *(b)* 21. H. 7. 29. B. Chall. 90. Cooke's case, 4. St. Tr. 748. and ruled, that the prisoner shall

not examine a juror concerning such matter on a *voir dire*, because it sounds in reproach. Vide 49. Edw. 3. 1. Ab. B. Chall. 25. F. Chall. 100. *(i)* 7. H. 7. 25. Ab. B. Chall. 55. F. Chall. 22. 20. H. 6. 40. 2. R. Abr. 657. Vide 49. Edw. 3. 1. Ab. B. Chall. 25. F. Chall. 100. *Sed quere*; for by TREBY, Chief Justice, no juror has any right to declare his opinion positively until he has heard the evidence in the cause. Cooke's case, 4. St. Tr. 748.

Sett. 29. But it hath been *(k)* adjudged to be no good cause of challenge, that the juror hath found others guilty *(k)* Kely. 9. 4. St. Tr. 744. Cranbourn's case.

on the same indictment; for the indictment is, in judgment of law, several against each defendant, for every one must be convicted by particular evidence against himself.

(a) *Stapleton's* *Sect. 30.* It hath been (a) ruled to be a good challenge of a juror on the part of the king, that he hath given his dogs the names of the king's witnesses.

(b) *Co. Litt. 156.* *Sect. 31.* It seems to be (b) settled, that where the king is a party he may take either a principal challenge, or to the favour.
4. H. 7. 8. F. Chall. 63. 44. Edw. 3. 38. B. Chall. 22. 2. R. Abr. 646.

(c) *F. Chall. 63. 65. Co. Litt. 156. 2. R. Abr. 646. 4. H. 7. 8. Tr. per Pais c. 9.* *Sect. 32.* It is (c) said, that the subject cannot take a challenge for the favour against the king, because every one is bound by his allegiance to favour the king. But if (d) no more be meant by these books, than that such a challenge is not good without shewing some actual partiality in such sheriff or juror, or some particular cause in respect whereof the king may influence them, it seems not clearly settled how the king in this respect hath a greater (e) privilege than the subject, which yet it seems agreed (f) that he hath.

(g) *2. R. Abr. 640. 646. 1. Ventris 309.* (e) For in the Year-Book of 20. H. 6. 40. ab. 2. R. Abr. 641. it is holden in the case of the subject to be no cause of challenge, that the sheriff hath malice against the party, without shewing some particular instance of partiality. (f) See the books cited to the other parts of this and the next section.

(g) *F. Chall. 17. S. P. C. 162. 2. R. Abr. 646.* It is said generally in some books, that it is a good challenge of a juror that he is the king's menial servant, or a valet of the crown. *Co. Litt. 156. F. Cor. 63. Tr. per Pais c. 9. 1. R. Abr. 646.* But 3. State Trials 235, 236. 4. St. Tr. 70. and in other books, the contrary is ruled. *B. Chall. 154. 4. H. 7. 3. Cro. Eliz. 663.* (b) Vide sup. f. 33. (i) *Co. Litt. 157, 158. Tr. per Pais c. 9. 2. R. Abr. 635. 666.*

AND now I am in the second place to consider the learning of challenges, so far as it particularly relates to Aliens.

Sect. 34. By 28. Edw. 3. c. 13. f. 2. it is enacted,
 " That in all inquests and proofs to be taken or made
 " amongst

“ amongst aliens and denizens, be they merchants or (a) (a) F. In-
 “ other, as well before the mayor of the staple as before ^{quest 22.}
 “ any other justices or ministers, although the king be ^{3. Ed. 4. 11.}
 “ party, the one half of the inquest or proof shall be deni-
 “ zens, and the other half aliens, if so many aliens and
 “ foreigners be in the town or place where such inquest
 “ or proof is to be taken, that be not parties nor with
 “ the parties in contracts, pleas, or other quarrels, whereof
 “ such inquests or proofs ought to be taken: And if there
 “ be not so many aliens, then shall be put in such in-
 “ quests or proofs, as many aliens as shall be found in the
 “ same towns or places which be not thereto parties, nor
 “ with the parties, as aforesaid, and the remnant of deni-
 “ zens, which be good men, and not suspicious to the one
 “ party nor to the other.”

Sec. 35. By 9. Hen. 6. c. 29. the above-recited statute of 2. Hen. 5. which requires that the jurors in certain cases shall have tenements to the yearly value of forty shillings, “ shall be no wise prejudicial to this statute of 28. Edw. 3. nor extend itself but only to the inquests to be taken between denizen and denizen.”

Also it seems agreed, (b) that the subsequent statutes (b) Cro. Eliz., which require that jurors shall have tenements to a greater ^{272.} value, no way repeal the said statute of 28. Edw. 3. Yet it (c) C. Eliz. seems, (c) that the English half of the jury ought to have ^{272.} tenements to the same value as in other cases. And it ^{(d) C. Eliz. 841.} hath been (d) adjudged, that the words “ *quorum quilibet habeat quatuor libratas terræ, &c.*” shall be applied to the English only.

Sec. 36. It seems (e) agreed, that there is no need that (e) Sum. 260. any of those who find an indictment against an alien should S. P. C. 159. be aliens.

Sec. 37. Also it hath been adjudged, (f) that the said (f) Dalison statute of 28. Edw. 3. is repealed as to trials for treason ^{22.} by (e) 1. and 2. Philip and Mary; c. 10. which enacts, ^{Dyer 144.} “ That all trials for treason shall be according to the ^{145.} course of the common law.” Yet it seems that the ^{1. Institute 27.} (b) king may, if he think fit, make a special grant to an ^{Summary 262.} alien to be tried for treason by a jury whereof the one half ^{(g) 71. Cap. 142. f. 123.} shall be aliens.

(b) S. P. C. 158. F. Trial 71. 22. Edw. 3. 14.

(a) 21. H. 6. *Seft.* 38. Also it hath been adjudged (a), that the said statute of 28. Edw. 3. doth not extend to an appeal, of other action by an alien against an alien, for the words are, "all inquests, &c. between aliens and denizens."

S. P. C. 260.

But by 27. Ed.

3. 8. it is enacted, that in pleas between aliens concerning the staple there shall be a jury of none but aliens. S. P. C. 159.

(b) B. Den. 4. *Seft.* 39. It is (b) holden, that by "denizens" in this statute are meant not only those who are born within the king's ligeance, but also those who are made denizens by the king's letters patents.

(c) Dyer 28. *Seft.* 40. It seems to be (c) settled, that no alien, whether he be plaintiff or defendant, can take any advantage of the statute, unless he (d) pray it in time; and that if he have neglected to pray it before the return of a common *venire*, he can neither except to such *venire*, nor pray a *tales* or other process *de medietate linguæ*.

F. Inquest 22.

Trial 71. Summary 261. B. Panel 3. Con. 21. H. 7. 32. B. Deniz. 4. S. P. C. 259. It is holden Cro. Eliz. 869. by two Judges against one, that though the defendant appear by the declaration to be alien, yet the common *venire* is well awarded, unless a *venire de medietate* be prayed. (d) For the form of such a prayer, Raft. Ent. 7. 158, 159. 264, 265. Dyer 144. S. P. C. 259. Plowden 2. 2. Hale 272. 3. Bac. Abr. 263.

(e) Dyer 304. *Seft.* 41. It was (e) holden, even before the union of the two kingdoms under king *James the first*, that no Scot was an alien within the meaning of this statute, not only because the Scotch language is the same with the *English*, but also (f) because the Scots were never reckoned aliens, but rather subjects.

(f) But *quare*

of his reason, for it seems contrary to what is admitted in the whole argument of Calvin's Case, 7. Coke. See 1. State Trials 572, 573. 4. St. Tr. 652, &c.

(g) Dyer 144. *Seft.* 42. NOTE, That (g) some of the precedents for the award of a *venire* of a jury of half denizens and half aliens, in pursuance of 28. Edw. 3. mention, that the aliens shall be of the same country whereof the party alleges himself; and others direct (h) generally, that one half of the jury shall be aliens, without specifying any country in particular. And this form seems most agreeable to the statute, which speaks of aliens in general; and it seems to be confirmed both by late (i) practice, and the greater number of (k) authorities.

(i) S. P. C.

158.

B. Deniz. 4.

B. Panel 3.

Con. F. Tr.

30. By five Judges against one.

Seft. 43. If, on a *venire* of half denizens and half aliens, the sheriff return twelve as aliens, and among them some who

who in truth are not such, it seems (a) that the party shall (a) 2. R. Abr. not be concluded by such return, but may, notwithstanding, challenge the array for want of a sufficient number of 643. Vide S. P. C. 158. aliens.

Seft. 44. It seems (b) agreed, that the return of a *venire* (b) C. Eliz. of half denizens, and half aliens, ought to specify which of 818. 841. the jurors are denizens and which aliens; and that a full But this being number of each must appear to be sworn. only a misreturn is helped by a verdict in cases within the statute of Jeofails.

Seft. 45. If one or more be wanting to make up the full 35. Hen. 8. number of six denizens or aliens, the justices of *nisi prius*, by c. 6. a reasonable (c) construction of the statutes which give a (c) 10. Co. *tales de circumstantibus*, may award such a *tales* for so many 104. Cro. Eliz. 305. denizens or aliens as shall be wanting. 818. 841.

CHAPTER THE FORTY-FOURTH.

OF TRIAL BY PEERS.

AS TO THE TRIAL *by peers*, having shewn already, ch. 39. f. 1. that a peer has no more privilege than a commoner as to having the benefit of counsel; and ch. 43. f. 4. that a peer cannot challenge any of his peers;

I shall now endeavour to shew,

1. The particular form and solemnity to be observed in such a trial.
2. Who are to be triers.
3. Who are to be so tried.
4. As to what crimes.
5. Upon what suits and pleas.
6. Whether a peer can waive a trial by his peers.
7. In what manner the peers may require the opinion of the lord steward or of the judges.
8. Whether the Court may be adjourned.

As to THE FIRST POINT, *viz.* The particular form and solemnity to be observed in such a trial.

Sec. 1. When an indictment is found against a peer for a crime for which he ought to be tried by his peers, the king by his commission under THE GREAT SEAL, reciting the indictment, constitutes some (a) peer high (b) steward of the kingdom *pro hac vice*, and by the same commission gives him power to receive and proceed on such indictment, and requires the peers to be attendant on him, and the lieutenant of THE TOWER to bring the prisoner before him.

Ante 5. 4. Comm. 259. (b) 1. H. 4. 1. 3. Inst. 28. 13. H. 8. 11. S. P. C. 152. Year-Book 11. H. 8. 11. 4. Inst. 59. Barr. 234. The necessity of making a high steward for the trial of an impeachment for high treason was denied by the house of commons in the Earl of Danby's Case, 2. State Trials 198.

(a) 3. Inst. 28. *Sett. 2.* Also (a) a *certiorari*, which may either have the same date with the steward's commission, or a subsequent one, goes out of chancery to certify the indictment before the steward *indilais*; and the steward by his precept, under his seal, directed to those before whom the indictment was found, appoints a certain day and place at which it shall be certified. And another writ goes out of chancery to the lieutenant of THE TOWER, &c. to bring the prisoner before the steward at such a day and place as he shall appoint; and thereupon the steward by his precept under his seal directed to the lieutenant, &c. appoints the day and place.

(b) This is to be intended when the parliament is not sitting, but is either dissolved or prorogued. *Sett. 3.* Also the steward makes (b) another precept under his seal to THE SERJEANT AT ARMS, appointed to serve him during the time of his commission, to summon the (c) peers before him at such a place, day and hour, &c. 3. State Tr. 659 to 663. 3. Inst. 28. S. P. C. 152; 13. H. 8. 11. (c) It is said 13. H. 8. 11. S. P. C. 157. that the steward shall make such precept to cause twenty or eighteen peers to come before him; but Sir Edward Coke 3. Inst. 28. says, that the precept doth not mention any certain number; and now by 7. Will. 3. all the peers are to be summoned. Kelynge 56. 4. Comm. 260.

(d) 3. Inst. 28. *Sett. 4.* At the time appointed the steward, attended (d) (e) Rushw. with six or (e) seven serjeants at arms, carrying maces before him, and by the king at arms, and the usher of the black rod, enters the place of trial uncovered, and ascends a chair of state, which always is (f) provided for that purpose, and then the (g) clerk of the crown, or a (h) matter in chancery delivers to him his commission, and he delivers it again to the clerk (i) of the crown, and then a serjeant at arms makes three (k) *eyes*, and a proclamation for silence in the name of the steward, and then the lord steward and all the other lords (l) standing up uncovered, the commission is read, and then the (m) usher on his knees delivers to the steward a white rod, who delivers it to him or to a serjeant at arms, who holds it by him during the trial; then an (n) *eyes* is made, and a command given in the name of the steward to all justices and commissioners, to certify all indictments, &c. which being delivered into court, the clerk of the crown reads the return. Another *eyes* is made that the lieutenant of the Tower, &c. return his writ and precept, and bring the prisoner to the bar; and then the prisoner is brought to the bar, the (o) gentleman-gaoler of the Tower carrying the axe before him, which being (p) done the clerk reads the return. (p) By 3. Inst. 28. all this is to precede the call of the peers and their seating themselves; but 1. H. 4. 1. and 13. H. 8. 11. and S. P. C. 152. 1. State Trials 266. 3. State Trials 955, 956. 4. State Trials 353 to 355. and 2. Jones 55. are contrary.

Sec. 5. All things being thus prepared, the high steward (*a*) acquaints the prisoner with the nature of the crime, and such like matters proper for such an occasion, and then the clerk of the crown arraigns him, (*b*) but is not to insist on his holding up his hand. the precedent section. (*b*) Raym. 408. 3. State Trials 658. 957. 2. State Tr. 702, 703. (a) 3. Inf. 29. S. P. C. 152. 2. Jones 55. and the other books cited to

Sec. 6. After the prisoner hath pleaded, and put himself upon GOD AND HIS PEERS, the king's counsel go through with their evidence; and after the prisoner hath made his defence, and the king's counsel have been fully heard, the prisoner is withdrawn from the bar, and the lords go together to consider of their evidence; and when a majority of them are agreed, they return to the place of trial, and the lord steward demands of them one by one, beginning with the puiſne, whether the person arraigned be guilty or not guilty, and they (*c*) all answer one by one, not upon their oaths, but on their (*d*) honours and ligances. And the lord steward gives judgment according to the determination of the (*e*) majority, being more than twelve, but gives no vote himself on a trial by (*f*) commission, but only on a trial by the house of peers, while the parliament is sitting. books above cited, and 1. Coke 30. 2. Inf. 49. (*c*) 1. H. 4. 1. 13. H. 8. 12. S. P. C. 153. 3. Inf. 30. Moor 622. (*f*) 2. State Tr. 702. 3. State Tr. 657. 679. (c) 3. Inf. 30. 2. Inf. 49. F. Corone 34. 1. H. 4. 1. S. P. C. 152. 13. H. 8. 12. 2. Jones 55, 56. 10. Ed. 4. 61. (d) See the

As to THE SECOND POINT, viz. Who are to be triers.

Sec. 7. It is agreed, (*g*) that none but lords who have a vote in parliament can pass on such a trial; and before 7. Will. 3. c. 3. when the trial was by commission, it seems to have been the practice for the lord steward to cause as many temporal lords to be summoned as he thought fit; and for the lords so summoned alone to pass on the trial. But this is remedied by that statute, set forth more at large in the next section. (g) 2. Inf. 48. Co. Litt. 150.

Sec. 8. It is agreed, that at a trial before the house of peers, every temporal lord who has a right to vote in that house, has a right to pass on such trial. But it is said in THE YEAR-BOOK of 10. Ed. 4. 6. (*h*) *pi.* 17. that upon the trial of a peer in parliament, the bishops shall make a procurator, because they cannot consent to the death of a man; but this is (*i*) said to be wholly grounded on a canon not in force at this day. Neither do I find any precedent wherein they have been excluded against their consent, or have withdrawn themselves without a protestation of their right, or making a proxy; (*k*) and the judgment against the *Spencers* was proxies. Sir Edward Coke 3. Inf. 31. says, that they must withdraw and make their proxies. (*i*) See Bishop Stillingfleet of the bishops' jurisdiction in criminal cases, c. 2, 3. and Hunt's argument, c. 9, 10, 11. (*k*) Vide the 4. Comment. 161. Post, 248. (b) Ab. F. Cor. 34. cited S. P. C. 153. Brook in a note of the same case, Corone 153. says, that they shall make

expressly reversed for this reason among others, because the bishops were not present; and in the precedents chiefly insisted on of the other side, it is not expressly said that they were not present, and it doth not clearly appear, but that they might be included under the word "peers."

(a) See Hunt's argument for the right of bishops, &c. c. 12. and Stillingfleet of the bishops' jurisdiction in capital cases, c. 1. sect. 3. and c. 2. (b) 2. State Tr. 742. (c) B. 1. c. 14. sect. 1.

However, it hath been always (a) admitted that they have a right to vote in a bill of attainder: also in the *Earl of Danby's Case*, they were adjudged (b) by the house of lords to have a right to vote in questions *previous* to the trial of a peer, though this was strongly opposed by the house of commons. And their right to vote at the trial itself, if they think fit, seems fully implied in 7. Will. 3. c. 3 which enacts, "That upon the trial of any peer or peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned twenty days at least before every such trial, to appear at every such trial; and that every peer so summoned and appearing, shall vote at the trial; every such peer first taking the oaths of allegiance and supremacy, and subscribing and repeating the (c) declaration against popery."

As to THE THIRD POINT, *viz.* What persons are to be thus tried.

Sect. 9. It is (d) agreed, that no lord of any (e) other country, or even of (f) *Scotland*, before the union under *Queen Anne*, or of (g) *Ireland*, nor the son and heir (b) apparent of any peer, or any other man whatsoever who is not at the time a lord of parliament, hath any right to such a trial in this kingdom; but that every lord of parliament hath a right to such a trial (i) by virtue of that clause in *MAGNA CHARTA*, ch. 29. "*Nec super eum iudicabitur, nec super eum mittetur, nisi per legale iudicium parium suorum vel per legem terræ.*"

(d) 2. Inst. 48. 3. Inst. 30. Co. Litt. 156. (e) Vide F. Brief 473. 20. Ed. 4. 6. B. Noms de Dignity 49. (f) 9. Coke 117. Vide 32. Ed. 3. 35. B. Noms de Dignity 29. (g) Vide sup. c. 25. sect. 50. (b) B. Treason 2. (i) Such trial is said to be very ancient, 2. Inst. 45. 50.

Sect. 10. It is recited by 20. Hen. 6. c. 9. to have been a doubt in the law of *England* how ladies of great estate in respect of their husbands, peers of the land, married or sole; that is to say, dutchesses, countesses, or baronesses, shall be put to answer, and judged upon indictments of treasons and felonies, because they are not mentioned in the said statute of *MAGNA CHARTA*, ch. 29.; and thereupon to put out such doubts, (k) it is declared, "That such ladies so indicted of any treason or felony, whether they be married or sole, shall thereof be brought to answer, and judged before such judges and peers of the realm, as peers of the realm

(k) 2. Inst. 45. 50. and see the *Dutchess of Kingston's Case*, 11. State Trials.

"realm should be, if they were indicted or impeached of such treasons or felonies."

Seft. 11. It seems agreed, (a) that a queen, the king's consort, and also a queen dowager, whether she continue sole after the king's death, or take a second husband, be he a peer or commoner; and also all peeresses by birth, whether they be sole or (b) married to peers or commoners; and also all marchionesses and viscountesses, are intitled to the trial by the peers, though none of them be expressly mentioned in this act, or in MAGNA CHARTA. But it is (c) agreed, that a peeress by marriage loses her dignity by marrying a commoner.

(a) 2. Inf. 5a.
Crompton
Jurif. 33-

(b) See the citations to the next letter.

(c) 2. Inf. 50.
Co. Litt. 16.
6. Coke 53.
Dyer 79.

Seft. 12. It is said by (d) Staundforde and (e) Coke, that those who are lords of parliament not in respect of their nobility, but of their baronies which they hold of the crown, as bishops now do, and some abbots and priors (f) did formerly, are not within the intent of MAGNA CHARTA, to be tried by the peers. And (g) Selden seems clear, that this is the only privilege which bishops have not in common with other peers. And those who seem (h) most for the contrary opinion admit that the law hath been generally so taken. Neither do they produce any precedent where a bishop or abbot has been tried by the peers upon a commission; but on the contrary admit that there are (i) two precedents of their being tried by the country. And it is said by (k) others, that there are divers precedents of this kind; yet Selden, with his utmost diligence, seems able to produce but two which clearly and fully come up to his point, viz. those of archbishop Craumer and bishop Fisher. However it seems to be (l) agreed, that while the parliament is sitting a bishop shall be tried by the peers.

(d) S. P. C. 151.
(e) 3. Inf. 30.
But in F. Cor. 161. it seems admitted that a bishop shall be tried by the peers, in cases proper for such trial; and B. Trial 142. cites a note from F. Chall. 215. wherein he says it was holden that bishops shall be tried by the peers; but this is mistaken, for there is no

such opinion there holden. (f) Co. Litt. 97. Fuller's Ch. History b. 6. fol. 292. (g) Selden of Baronage 152. Titles of Honour, 1st edit. p. 247. (h) Hunt's argument for the bishop's right in capital cases, ch. 18. Gibson's Codex 154. Stillingfleet of the bishops' jurisdiction in capital cases, c. 4. (i) B. Trial 142. See Hunt's argument c. 18. and Stillingfleet of the bishops' jurisdiction in capital cases. (k) S. P. C. 153. Seld. Baron 142 to 155. Vide 3. Inf. 30. (l) See Hunt's argument c. 18. Trials per Pais c. 2. par. 8. i. State Trials 374. Stillingfleet of the bishops' jurisdiction in capital cases. B. Abr. Trial 142. contrary. Vide 4. Comm. 462.

As to THE FOURTH POINT, viz. As to what crimes a peer is to be tried by his peers.

Seft. 13. I take it to be (m) agreed, that he has a right to be so tried upon an indictment of treason, or felony, (n) whether such treason or felony be made such by the common law or by statute; and also upon an indictment for a

(m) 3. Inf. 30.
2. Inf. 40.
S. P. C. 153.
1. Bullf. 198.
(n) S. P. C.

158. 1. Bullstrode 198.
mis-

(a) See the books above cited. (a) See the misprision of treason or felony; but it (a) seems, that regularly he is to be tried by the country for all other crimes out of parliament, as (b) *præmunire*, (c) riot, (d) seducing a young lady from her parents in order to debauch her, &c.

(b) 1. Bulfr. 198, 199. 3. Inst. 30. 12. Coke 93. (c) 3. State Tr. 79.

(d) 3. State Tr. 52. 12. Coke 93.

As to THE FIFTH POINT, viz. Upon what suits and pleas a peer is to be tried by his peers.

(e) 10. Ed. 4. 6. Sect. 14. It hath been (e) adjudged, that he shall not be so tried upon an appeal of felony, but only upon an indictment; and the reason given for it is, that those words in MAGNA CHARTA, ch. 29. *nec super eum ibimus*, &c. are to be intended only of the suit of the king, and not of the suit of the subject.

(e) 10. Ed. 4. 6. F. Corone 34. B. Corone 153. S. P. C. 152. 2. Inst. 49. 3. Inst. 30. Rastal 50.

(f) 3. Inst. 28. Sect. 15. Also it hath been (f) adjudged, and appears from constant (g) experience, that neither the said clause of MAGNA CHARTA, nor any other law, privileges a peer from being indicted by a grand jury of commoners, either in the king's bench, or before commissioners of *oyer*, or the coroner, &c.

(f) 3. Inst. 28. 2. Inst. 49. (g) 1. H. 4. 1. 3. State Tr. 52. 79. 657. 951. 4. State Tr. 351, &c. Skinner 683. 4. Comm. 259.

(b) 3. Inst. 31. Sect. 16. Also it seems (b) to be clear, that if a peer absent himself, and cannot be found, he may be outlawed *per judicium coronatorum*, &c.

(b) 3. Inst. 31. 2. Inst. 49.

Sect. 17. Also it is said, that the court of king's bench may allow a (i) pardon pleaded by a peer to an indictment in that court; but that it cannot receive either his plea of not guilty, or confession, but only the lord steward on an arraignment before the lords.

(i) 2. Inst. 49.

Sect. 18. It seems clear, that if a peer be (k) attainted of treason or felony, he may be brought before the king's bench and demanded, what he has to say why execution should not be awarded against him? And if he plead any matter to such demand, his plea shall be discussed, and execution awarded by the said court, upon its being adjudged against him.

(k) 1. H. 7. 22. 23. B. Corone 129. Treason 18. F. Corone 49.

In the case of Earl Ferrers, April 17, 1760, it was determined by all the Judges, that a peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the same according to the provisions of 24. Geo. 2. c. 37. (vide *infra*, c. 51. sect. 10.) And, secondly, supposing the day appointed by the judgment for execution should lapse before such execution done, that a new time may be appointed for the execution, either by the high court of parliament before which such peer shall have been attainted, although the office of high steward be determined, or by the court of king's bench, the parliament not then sitting, and the record of the attainder being properly removed into that court. Foster 139.

As to THE SIXTH POINT, viz. Whether a peer can waive a trial by his peers.

Sec. 19. It hath been (a) adjudged, that if a peer on an arraignment before the lords refuse to put himself upon his peers, he shall be dealt with as one that stands mute; for it is as much the law of the land, that a peer be tried by his peers as a commoner by commoners. Yet if one who has a title to peerage, be indicted and arraigned as a commoner, and plead not guilty, and put himself upon his country, it hath been (b) adjudged, that he cannot afterwards suggest that he is a peer, and pray a trial by his peers.

(a) 1. *Rufshw.* part 2. f. 94.
3. *Inst.* 30.
Kelynge 57.
Yet there is a record in 4. *Edw.* 3. that T. *Ld. Berkeley* put himself on his country, and was tried by a jury of knights. (b) *Dalton* 16.

As to THE SEVENTH POINT, viz. In what manner the peers may require the opinion of the lord steward, or of the judges.

Sec. 20. It was (c) resolved by all the judges in the *Lord Dacre's Case*, who was tried by commission, that no question ought to be asked of the lord steward or of the judges in the absence of the prisoner. And it was (d) adjudged by the lord steward, in the *Earl of Warwick's Case*, who was tried by the house of peers in parliament, that no question ought to be asked of the judges in the absence of the prisoner. But in the *Lord Audley's Case*, who was tried by commission, the lords triers, (e) after they were withdrawn, consulted with the lord chief justice four several times, and also sent to consult with the lord steward. Yet, notwithstanding this precedent, the judges (f) resolved in the *Lord Morley's Case*, who was likewise tried by commission, that if after the lords were withdrawn they should send for any of the judges to desire their opinions on a point in law, and the lord steward should permit them to go, they would tell the lords, if they should ask them any question, that they were not to give any private opinion without conference with the rest of the judges, and that openly in court. But they resolved, that if the lord steward should ask them any question in open court, though in the absence of the prisoner, they would answer it, because they are called to assist the Court, and the demand of any question in such case is to be referred to the discretion of the lord steward.

(c) 3. *Inst.* 29, 30.
2. *Inst.* 49.
Kelynge 57.
3. *St. Tr.* 679.
(d) 4. *St. Tr.* 381.
(e) 2. *Rufshw.* p. 2. f. 101.
1. *St. Tr.* 271.
(f) *Kely.* 54.
7. *State Tr.* 422, 423.
Sed vide 3. *Inst.* 29. and 30.

Sec. 21. When a peer is tried before the house of peers in parliament, the lord steward (g) withdraws with the rest of the lords, and consults with them.

(g) 3. *St. Tr.* 679.

As to THE EIGHTH POINT, viz. Whether the Court may be adjourned.

(a) 1. St. Tr. 954-3. St. Tr. 677 to 680. Foster 143. *Seet. 22.* It is agreed, (a) that where a peer is tried by the house of lords in full parliament, the house may be adjourned as often as there is occasion, and the evidence taken by parcels.

(b) Rushw. p. 2. f. 95. 1. St. Tr. 265. But Moor 622. Foster 140. *Seet. 23.* Also it hath been (b) adjudged, that where the trial is by commission, the lord steward, after a verdict is given, may take time to advise upon it, and that his office continues till he has given judgment.

(c) Kely. 57. But Moor 622. in a report of the very same case, it is said that the contrary was holden. *Seet. 24.* Also it was (c) said to have been agreed by the judges in the *Lord Dacre's Case*, that on such a trial the Court might be adjourned; and that if the lords triers did not agree, it was holden by some they ought to be kept together all night, and by others that they might go to their several houses.

(d) 3. St. Tr. 678. But see Moor 622. *Seet. 25.* But it is said, (d) that there is no precedent of the lords triers ever having separated upon a trial by commission, after the evidence has been given for the king.

(e) 3. Inst. 30. in the margin. *Seet. 26.* And it is said to have been (e) resolved by all the judges in the case of the *Duke of Norfolk*, that the peers in such case must continue together till they agree to give

(f) 1. St. Tr. 677 to 680. *Seet. 27.* verdict, and the like was (f) adjudged by the lord steward in the *Lord Delamere's Case*.

During a trial before the house of peers in parliament, every peer present on the trial is to judge both of the law and the fact, Foster 142. and a lord high steward is usually, though not necessarily, appointed, rather in the nature of a speaker to regulate the proceedings, than as a judge. 4. Comm. 260. Foster 145. But in the court of the high steward which is held in the recess of parliament, he alone is judge in all points of law and practice, and the peers triers are merely judges of the fact. Fof. 142.

CHAPTER THE FORTY-FIFTH.

OF TRIAL BY BATTEL.

A TRIAL by Battel, at the (a) defendant's choice, is allowable in appeals (b) of treason before the constable and marshal, and in appeals (c) of felony, whether by appellants or (d) approvers.

(a) Finch 421. S. P. C. 176. Fletal. 1. c. 34. f. 27. Tr. per Pais B. Battel 15. S. P. C. 178. c. 2. f. 19. (b) Vide c. 23. f. 29. Crompton Jur. 82. b. 88. (c) Rastal 50. C. Eliz. 69. Dyer 120. S. P. C. 176. (d) Rastal 44. 9. Coke 31.

Sec. 2. For the manner of waging battel in an appeal of treason, being according to the civil law, I shall refer to Rushworth's Collections, part 2. volume 1. folio 112 to 128.

Sec. 3. When an appellee of felony wages battel, he pleads (e) that he is "not guilty, and that he is ready to defend the same by his body," and then (f) flings down his glove; and if the appellant will join battel, he replies, "That he is ready to make good his appeal by his body upon the body of the appellee," and takes up the glove: and then the appellee lays his (g) right hand on the book, and with his left hand takes the appellant by the right, and (h) swears to this effect, "Hear this, thou who callest thyself *John* by the name of baptism, that I who call myself *Thomas* by the name of baptism, did not feloniously murder thy father *W.* by name (on the — day of — in the year of — at *B.*) as you surmise, nor am any way guilty of the said felony; so help me God;" and then he shall kiss the book and say, "and this I will defend against thee by my body, as this Court shall award." And then the appellant lays his right hand on the book, and with his left hand takes the appellee by the right, and swears to this effect, "Hear this, thou who callest thyself *Thomas* by the name of baptism, that thou feloniously (on the — day of — in the — year of — at *B.*) didst murder my father *W.* by name; so help me God;" and then he shall kiss the book and say, "and this I will prove against thee by my body, as this Court shall award."

And then the Court shall (i) appoint a day and place for the battel, and in the mean while the appellee shall be kept

(a) Fleta b. 1. in the (a) custody of the marshal, and the appellant shall c. 33. f. 28. find (b) sureties to be ready to fight at the time and place, Raftal 42. unless he be an approver, in which case (c) he shall also be g. H. 4. 3. kept by the marshal.
S. P. C. 178.

B. Battel 1. F. Corone 78. 111. (b) Fleta b. 7. c. 34. f. 28. g. H. 4. 3. 17. Affize 1, S. P. C. 178. F. Corone 78. 111. B. Battel 1. 6. 17. Edw. 3. 2. Braeton b. 3. c. 21. f. 3. says, that both parties shall be kept in custody. (c) Raftal 42.

(d) g. H. 4. 3. And the (d) night before the day of battel, both parties B. Battel 1. shall be arraigned by the marshal, and shall be brought into (e) Fleta b. 1. the field before the (e) justices of the court where the appeal is depending, at the rising of the sun, (f) bare-headed, c. 34. f. 30, 31. Dyer 301. and bare-legged from the knee downwards, and bare in the B. Battel 15. arms to the elbows, and armed only with bastons an ell long, S. P. C. 177. and four-cornered targets, and before they engage they shall 178. both take this (g) oath, "Hear this ye justices, that I, A. B. Braeton b. 3. c. 21. f. 4, 5. "have neither eat nor drank, nor done any thing else, nor Britton 40. "any other for me, by which the law of God may be de- Con. 37. H. 6. 20. "pressed, and the law of the Devil exalted," (f) Britton 41.

By some the appellant's head shall be covered. g. H. 4. 3. B. Battel 1. Vide 1. H. 6, 6, 7. Dyer 301. (g) Fleta b. 1. c. 34. f. 30. Braeton b. 3. c. 21. f. 4. Britton f. 40.

(b) Fleta b. 1. And then after (b) proclamation for silence under pain of c. 34. f. 31. imprisonment for a year and a day, &c. they shall begin the (i) S. P. C. combat; where-in if the appellee be so far vanquished that he 178. b. cannot or will not fight any longer, he may be adjudged to See where this is done accordingly, 19. H. 6. 35. be (i) hanged immediately; but if he can maintain the fight F. Corone 6. till the stars appear, he shall have (k) judgment to go quit B. Corone 46. of the appeal. And if the appellant become recreant, that is, a crying coward or craven, the appellee shall not only Braeton b. 1. recover his damages, but may also, as it (l) seems, plead his c. 21. f. 6. acquittal in bar of a subsequent indictment or appeal, and (k) Trials per Pais c. 2. f. 19. the appellant (m) shall for his perjury lose his *liberam legem*. 3. Inst. 221. Yet if there be other appellees in the same appeal, it hath Fleta b. 1. been adjudged, (n) that it shall still stand in force against c. 34. f. 32. them. But for these matters I shall refer to ch. 24. sect. 24. Braeton b. 3. c. 21. f. 5. (l) Sup. c. 23. f. 140. and c. 35. f. 6. F. Corone 98. Fleta b. 1. c. 34. f. 32. (m) 3. Inst. 221. Co. Litt. 6. (n) F. Corone 98.

(o) Finch Sect. 4. In appeals each party must fight in proper (o) 421. 422. person, and not by champions. And therefore if the ap- 9. Coke 31. pellant be under an apparent disability of fighting, as being 3. Inst. 221. a (p) woman, or in (q) holy orders, or under (r) age, or of Plowden 335. Trials per Pais the age of (s) sixty, (t) or maimed, or (u) blind, he may c. 2. sect. 19. (p) Keilway 120. Fleta b. 1. c. 34. sect. 25. S. P. C. 180. (g) Brit- ton 40. (r) Keilway 120. Finch 423. F. Droit 3. S. P. C. 60. 180. 22. Edw. 4. 20. Fleta b. 1. c. 34. sect. 25. (s) S. P. C. 60. 180. F. Corone 385. 22. Ed. 4. 20. Trials per Pais c. 2. sect. 19. Fleta b. 1. c. 34. sect. 25. (t) Finch 423. F. Corone 230. 268. S. P. C. 180. 22. Edw. 4. 20. Trials per Pais c. 2. sect. 19. Fleta b. 1. c. 34. sect. 25. (u) F. Droit 57. 3. Inst. 158, 159.

counterplead the wager of battel, and compel the appellee to put himself upon his country. (a) Also if an appellant (a) F. Droits 57. become blind by the act of God after he has waged battel. 3. Inst. 158. the Court will discharge him of the battel; and in such case (b) 3. Inst. 159. it is (b) said, that the appellee shall go free. 158, 159.

Sett. 5. Also if a (c) peer of the realm, and much more if (c) Finch 423. the king bring an appeal, the defendant shall not be admitted S. P. C. 152. to wage battel, by reason of the dignity of the persons. Plowden 335. Fleta b. 1. c. 34. sect. 25.

Sett. 6. Also the citizens of London have a special (d) (d) S. P. C. 180. privilege by charter, that in appeals brought by any of them, F. Corone 125. 187. there shall be no wager of battel.

Sett. 7. Also any plaintiff may counterplead a wager of battel, by alledging such matters against the defendant as induce a violent presumption of guilt; as in an appeal of robbery, by shewing (e) that the defendant was taken with (e) Finch 422. the manner, &c.; and in an appeal of death, that he was 423. found lying upon the deceased (f) with a bloody knife in S. P. C. 179. his hand; and in any appeal, by shewing that the defendant F. Corone 100. 125. 144. being under an arrest for the crime charged against him, 157. 230. 268. (g) brake the prison, or (b) escaped, unless such breaking 375. or escape be (i) pardoned. For the law will (k) not oblige 4. Affize 1. a plaintiff to make good his accusation in so extraordinary a 22. Ed. 4. 19. manner, when in all appearance he may prove it in the or- B. Battel 5, 7. dinary way. It is also a good counterplea of battel, that the B. Appeal 114. defendant hath been (l) indicted for the same fact, unless pl. 18. the indictment were insufficient. Vide sup. c. 15. f. 41.

(f) Finch 422. S. P. C. 179. F. Corone 411. (g) Finch 422. S. P. C. 180. 1. Affize 3. 6. Hobart 82. F. Corone 154. 157. 164. 251. 281. (b) Finch 422. Hobart 82. S. P. C. 80. B. Battel 3. F. Corone 164. 251. (i) S. P. C. 100. Ho- bart 82. F. Corone 154. 281. B. Battel 3. 1. Affize 3. (l) Trials per Pais c. 2. f. 19. (l) Finch 422. 22. Edw. 4. 19. B. Battel 7. 11. Appeal 114. 20. Edw. 4. 6. Rastal 50.

Sett. 8. It is enacted by 6. Rich. 2. that the defendant shall not be received to wage battel in an appeal of rape.

CHAPTER THE FORTY-SIXTH.

OF

EVIDENCE.

AS to the nature of evidence, so far as it more particularly concerns criminal cases, I shall consider the following points :

1. In what cases the evidence must be given in the presence of the prisoner:

2. How many witnesses are required in criminal cases.

3. In what cases the deposition of witnesses out of court may be allowed as evidence.

4. In what cases the confession of the defendant may be given in evidence.

5. Of parol evidence ; and how far hearsay shall be admitted.

6. Of written evidence ; and whether similitude of hands shall be admitted.

7. How far it is necessary for the evidence to be the best that the thing will admit of.

8. Whether husband and wife may be witnesses for or against one another.

9. Whether a judge or juror may be a witness.

10. Whether a counsel or attorney may be a witness.

11. How far an accomplice may be a witness.

12. Whether a person attainted or convicted shall be a witness.

13. How far an interested person may be a witness.

14. How far religious sectaries may be witnesses.
15. How far infants, aliens, and persons deaf and dumb, may be witnesses.
16. In what manner witnesses are to give their evidence.
17. In what manner witnesses are compellable to attend.
18. In what cases witnesses may be allowed their expences.
19. What evidence maintains an indictment.
20. What may be given in evidence on the part of the defendant.
21. In what cases the character of witnesses may be supported or impeached.
22. Whether a bill of exceptions to evidence lies in criminal cases.

As to THE FIRST POINT, *viz.* In what cases the evidence must be given in the presence of the prisoner.

4. St. Tr. 277. *See* 1. It is a settled rule, that in cases of life no evidence is to be given against a prisoner but in his presence.

Rex v. Paine, 5. Mod. 165. † *See* 2. And therefore it is determined, that the depositions of witnesses taken *ex parte* before a magistrate on an examination concerning a *misdemeanor*, cannot be read in evidence on the trial of the party for such *misdemeanor*, after the death of the deponents; because as the defendant was not present before the magistrate when they were taken, he had no opportunity to cross-examine them.

As to THE SECOND POINT, *viz.* How many witnesses are required in criminal cases: I shall enquire,

1. How many witnesses are required in treason.

† 2. How many on an indictment for perjury.

As to the first particular, *viz.* How many witnesses are required in treason.

See 3. Having already endeavoured to shew that the common law did (a) not require any certain number of witnesses

(a) 3. Hawk. ch. 25. l. 129.

witnesses for the trial of any crime whatsoever, I shall only add in this place, that it seems to have been the more prevailing opinion, that 1. Edw. 6. c. 12. and 5. and 6. Edw. 6. c. 11. which required two witnesses in treason, were not repealed by 1. and 2. Philip and Mary, c. 10. (a) which ordered that all trials of treason should be according to the course of the common law; and therefore that it was still necessary in all trials of high treason, not concerning the coin, (b) to have either two witnesses to the (c) same overt-act, or one witness to one, and another (d) witness to an overt-act of the same kind of treason, or at least one witness to an overt-act, and (e) another to a material circumstance to prove it.

(a) The following authorities, 3. Inst. 26. Hale's Sum. 262. 1. Hale 296. to 306. 2. Hale 286. 2. State Trials 144. 171. 177.

Kely. 9. are examined by Mr. Justice Foster 232 to 240. and in his opinion confirm the assertion of Hawkins, that the statutes of *Edward the sixth* are not repealed by those of *Philip and Mary*. See cl. 25. f. 130 to 146. (b) Gilb. Law Ev. 153. 2. Stra. 1126. Cases Cro. Law 39. (c) Raymond 407, 408. 2. St. Tr. 533. 3. St. Tr. 688. (d) 1. St. Tr. 697. 723, 724. 2. St. Tr. 317. 695. 785. 829. 830. 3. St. Tr. 149. 156. 228. 4. St. Tr. 86, 87, 88. 117. Raymond 407, 408. Kelynge 9. (e) 2. St. Tr. 408. 3. St. Tr. 228, 229. 688, 689. 894 to 901. 928, 929, 630. 1. St. Tr. 636. But 1. St. Tr. 180, 181, it is holden that circumstantial evidence alone is sufficient.

Sec. 4. But in relation to these matters it will be need- *Vide chapter*
less, at this day, to examine how far these opinions were *25. sect. 134*
reconcilable with the first of Philip and Mary, the law seem- *to 146.*
ing to be settled by 7. Will. 3. c. 3. f. 2. which is express, *Foster 233.*

"That no person or persons whatsoever shall be indicted, tried, or attainted of high treason, whereby any corruption of blood may or shall be made to any such offender or offenders, or to the heir or heirs of any such offender or offenders, or of misprision of such treason, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt-act; or one of them to one, and the other of them to another overt-act of the same treason (f); unless the party indicted and arraigned or tried shall willingly, without violence, in open court, confess the same, or shall stand mute, or refuse to plead; or in cases of high treason shall peremptorily challenge above the number of thirty-five of the jury."

(f) A collateral fact not tending to the proof of the overt-act may be proved by

one witness. Foster 240, 242. Salkeld 654. per Holt. Vaughan's Case, 5 State Trials 17.

Sec. 5. And by 7. Will. 3. c. 3. f. 4. it is further enacted, "That if two or more distinct treasons of divers heads or kinds shall be alledged in one bill of indictment, one witness produced to prove one of the said treasons, and another witness produced to prove another of the said treasons, shall not be deemed or taken to be two witnesses to the same treason within the meaning of this act."

Foster 232.
238. 240.

Sec. 6. But it is said, that the statute of 1. Ed. 6. c. 12. which, both in petit and high treason, requires two witnesses upon the indictment and at the trial, and the 5. and 6. Edw. 6. c. 11. which, in all treasons, requires that the witnesses, if living, shall be examined in person at the trial in open court, are not altered as to *petit treason* by 7. Will. 3. c. 3.

Radbourne's
Case, Cases
in Cro. Law
364.

† *Sec. 7.* But it has been determined, that if a person be indicted for *petit treason* and *murder* in the same indictment, an information before a justice, made by the deceased on oath, in the presence of the prisoner, may be given in evidence on the trial; and that a conviction on such evidence is good, although there was not any set of circumstances proved by two witnesses.

(a) 4. St. Tr.
237, &c.
5. St. Tr. 17.
Salkeld 634.
Foster 242.

Sec. 8. However it was (a) agreed in *Sir John Fenwick's Case*, that the information of a witness taken upon oath before a justice of peace, being joined with the evidence of one other witness only *viva voce*, could not, in the ordinary course of justice, amount to sufficient evidence within the 7. Will. 3. which requires *two witnesses* in high treason; and therefore it was thought necessary to proceed in that case by bill of attainder in parliament, whole power can be restrained by no rules but those of natural justice.

Gahagan's
Case, Cases
in Cro. Law
39.

† *Sec. 9.* And it is determined, that one witness is sufficient in all cases of high treason where a conviction does not work a corruption of blood.

† As to the second particular, *viz.* How many witnesses are required on an indictment of perjury.

10. Mod. 195.

† *Sec. 10.* It seems to be agreed, that two witnesses are required in proof of the crime of perjury; but the taking of the oath and facts deposed may be proved by one witness only.

Ld. Ray. 396.

† *Sec. 11.* It is also agreed, that the party prejudiced by the perjury shall not be admitted as a witness to prove it.

As to THE THIRD POINT, *viz.* In what cases the depositions of witnesses taken out of court may be read in evidence.

† *Sec. 12.* By the statute 1. & 2. Philip & Mary, c. 13. s. 4.
“ Justices of the peace, when any person is before brought
“ them for manslaughter or felony, or suspicion of man-
“ slaughter or felony, beingailable by law, shall, before
“ any

any bailment or mainprife, take the *examination* of the said prisoner and the *information* of them that bring him of the fact and circumstances thereof, and the same, or as much as may be material thereof to prove the felony, shall put in writing before they make the same bailment; which said *examination*, together with the said bailment, the said justices shall certify at the next general gaol delivery to be holden within the limits of their commission."

† *Sec. 13.* By 1. and 2. Philip and Mary, c. 13. f. 5. "Every coroner upon any inquisition before him found, whereby any person or persons shall be indicted for murder or manslaughter, or as accessory or accessories to the same before the murder or manslaughter committed, shall put in writing the effect of the evidence given to the jury before him being material; and as well the said justices as the said coroner shall bind all such by recognizance as do declare any thing material to prove the same, to appear at the next general gaol delivery, and shall certify as well the same evidence as the recognizance in writing, &c."

† *Sec. 14.* By 2. and 3. Philip and Mary, c. 10. "The said justice or justices, before he or they shall commit or send such prisoner to ward, shall take the like examination of the prisoner and the information of those who bring him, and shall put the same in writing within two days after the said examination, and the same shall certify in such manner and form, and at such time as they should and ought to do, if such prisoner so committed or sent to ward had been bailed, &c."

Sec. 15. It seems (a) settled, that the examination of an (a) Kelynge informer taken upon (b) oath, and (c) subscribed by him 55. either before a (d) coroner upon an inquisition of death in Sum. 262, pursuance of 1. and 2. Philip and Mary, c. 13. or before (e) 263. justices of peace in pursuance of 1. and 2. Philip and Mary, 1. Levinz 180. c. 13. and 2. and 3. Philip and Mary, c. 10. upon a (f) 2. Keble 19. bailment or (g) commitment for any felony, may be given Vide C. Eliz. in evidence at the trial of such inquisition, or of an indict- 901. ment for the same felony, if it be made out by oath to the Dalton c. 111, satisfaction of the Court, that such informer is (b) dead, or (b) 1. St. Tr. 112, 113. 265.

Sum. 262, 263. (c) Sum. 262, 263. (d) Supra c. 9. sect. 31. 2. Jones 53. (e) See the books above cited; but 2. Jon. 53. it is adjudged that depositions before a coroner may be read, but said that those taken before a justice of peace can in no case be read. (f) Supra c. 15. sect. 59, 60, 61. (g) Supra c. 16. sect. 11. (b) Kelynge 55. 1. Levinz 180. 1. Hale 305. 2. Keble 19. Summary 263.

(a) Kely. 55. unable to (a) travel, or kept (b) away by the means of procurement of the prisoner, and that the examination offered in evidence is the very same (c) that was sworn before the Coroner or justice, without any alteration whatsoever.
 In Harrison's Case, 3. State Trials 941.
 Such an examination was read in evidence, upon proof that the witness had been enticed away, though it did not directly appear to have been done by the procurement of the prisoner. (c) Kely. 55. 2. Keble 19. Summ. 263. 2. Hale: 285. 1. Hale 305.

Foster 337. † Sect. 16. But in *petit treason*, these depositions, it is said, are not sufficient to convict the offender if the party be living, although he is unable to travel, or is kept out of the way by the procurement of the prisoner.

(d) Kely. 55. Sect. 17. It hath been (d) adjudged, that it is not sufficient to authorise the reading such an examination, to make oath that the prosecutors have used all their endeavours to find the witness, but cannot find him;—† for unless proper search be made, the Court will not admit depositions to be read, although taken fifty years before they are offered in evidence.
 Benfon v. Olive,
 2. Stra. 920.

Bull. N. P. 239. † Sect. 18. But if due diligence be used, and it is made manifest that the deponent has been sought for and cannot be found, or if it be proved that a witness was subpoenaed and fell sick by the way, it is said that his deposition may be read, for that in such case he is in the same circumstances as to the party that is to use him as if he were dead.

(e) 2. Roll. 460, 461. Sect. 19. Also it hath been (e) adjudged, that depositions taken before a CORONER upon AN INQUISITION of death *super visum corporis*, cannot be given in evidence upon AN APPEAL for the same death, because it is a different production from that wherein they were taken.
 Vide 1. Sid. 325.
 2. Keble 384.

(f) Fost. 234. Sect. 20. There are many (f) instances in the reigns of queen Elizabeth and king James the first, wherein the depositions of absent witnesses were allowed as evidence in treason and felony, even where it did not appear but that the witnesses might have been produced *viva voce*.
 Dyer 99, 100.
 1. State Trials.
 Duke of Norfolk's Trial,
 81.
 Abington's Trial 118, 119. Udal's Trial, fol. 148, 149. Earl of Essex's Trial, fol. 166.
 Sir Walter Raleigh's Trial, fol. 181, 182. and the like was admitted in the Lord Audley's Case, on an indictment for a rape on his own lady, 1. State Trials 268, 269.
 1. Ruthworth, Strafford fol. 231. 526 to 531.

(g) 3. St. Tr. 204. Sect. 21. And it was adjudged in (g) the Earl of Strafford's trial, that where witnesses could not be produced *viva voce*, by reason of sickness, &c. their depositions might be read for or against the prisoner on a trial of high treason, but not where they might have been produced in person.
 407.
 1. Baym.

Sec. 22. And it was admitted (a) in the *Lord Stafford's* trial, that the depositions taken by a witness before a justice of the peace might, at the prisoner's desire, be read at the trial, in order to take off the credit of the witness, by shewing a variance between such depositions and the evidence given in court *viva voce*. (a) 2. St. Tr. 622 to 627. 644. 647. 651. 1. St. Tr. 911.

Sec. 23. And for the same reason it seems (b) agreed, that where a witness at one trial varies from his own evidence at another, in relation to the same matter, such variance may also be given in evidence to invalidate his testimony at the second trial. (b) 2. St. Tr. 343. 344. 528. 529. See sect. 12.

Sec. 24. But it is (c) said to have been adjudged in *Paine's Case*, in the seventh year of *William the third*, by the court of king's bench upon advice with the justices of the common pleas, upon an indictment for a libel, that depositions taken before a justice of peace relating to the fact cannot be given in evidence, though the deponent be dead; and that the reason why such depositions may be given in evidence in felony, depends upon the statutes of *Philip and Mary*; and that this cannot be extended farther than the particular case of felony (d). But in the report of this case in (e) *Fifth Modern* it is said that the reason why such depositions could not be read, was because the defendant was not present when they were taken, and therefore had not the benefit of a cross-examination. (c) Salk. 281. Sup. sect. 3. (d) See Rex v. Eriswell, 3. Term Rep. 7. 7. (e) 5. Mod. 165.

Vide *Rushw. Stafford* 524 to 531. 2. St. Tr. 420. 4. St. Tr. 261. and 2. Roll. 460, 461.

† *Sec. 25.* And it has been held, that an examination of a person murderously wounded, taken by a justice of the peace, at the poor-house of the parish, on oath, and regularly signed, but in the absence of the prisoner, cannot be read in evidence on the subsequent trial of the prisoner for murder, for it is taken extrajudicially, and not as the statutes of *Philip and Mary* direct, in a case where the prisoner is brought before him in custody, and he has the opportunity of contradicting or cross-examining as to the facts alleged. Rex v. Will. Woodcock, Cases Cro. Law 397. George Dingle's Case at the Old Bailey Sept. Session. 1791, coram GOULD and GROSE, Justices.

† *Sec. 26.* But the depositions thus extrajudicially taken may in the particular case of murder be read as the dying declarations of the deceased (f) if *in extremis*, (g), or (h) in such a state of mortality as to render the apprehension of approaching dissolution probable (h). (f) 12. Vincr Abr. 118. (g) 4. St. Tr. 203.

9. St. Tr. 161. 10. St. Tr. 504. (h) Cases Cro. Law 397.

† *Sec. 27.* So the depositions of an accomplice taken by a justice of the peace in the presence of the prisoner, pursuant to the statutes of *Philip and Mary*, may be read in evidence on the trial of the prisoner, if it be proved that the accomplice is dead. Westbeer's Case, Cases Cro. Law 12.

Rex v. Ravensstone.
5. Term Rep.
323.

† *Sec. 28.* So the examination of a pregnant woman taken before a justice of the peace under the statute of 6. Geo. 2. c. 31. is admissible evidence, on an application to the quarter-sessions to make an order of filiation on the putative father, even though the woman die before such application can be made.

(a) 4. St. Tr.
265 to 272.
Sup. sect. 9.
1. bid. 325.
2. Kcble 384.
(b) 4. Term
Rep. 290.
Bull. N. P.
243.

Sec. 29. But in *Fenwick's Case* it was (a) agreed, that the evidence given by a witness at one trial, cannot in the ordinary course of justice be made use of against a defendant, on the death of such witness, at another trial.—† But it is said to have been since agreed in *Lord Palmerston's Case*, (b) that the evidence which a witness gave on a former trial may be used on a subsequent one, if he die in the mean time, but that in such case the words used by the witness at the former trial, and not merely the effect of them, must be proved.

Welch's case,
2. Hale 285.
1. Hawk. c.
42.
Lit. Rep. 167.
2. Roll. Ab.
679.

Sec. 30. Also it seems clear, that depositions taken in the spiritual court in a cause of divorce for a forcible marriage cannot be given in evidence upon an indictment for such marriage on the statute of 3. Hen. 7. c. 2.—† For it is a general rule, that depositions taken in a court not of record shall not be allowed in evidence elsewhere, though the witness be dead.

As to THE FOURTH POINT, viz. In what cases *the confession* of a prisoner may be given in evidence.

Sec. 31. It seems that the confession of the defendant himself, taken upon an (c) examination before *justices of peace*, in pursuance of the statutes of *Philip and Mary*, upon (d) a bailment or (e) commitment for felony, hath always been allowed to be given in evidence against the party confessing.
(c) Sum. 102.
193. 262. 264.
1. Hale 204.
3. State Trials
15 131.
(d) Antec. 15.
sect. 11. 58.
(e) 1. State Trials 89. 186. 964.

(f) Kely. 18.
19.
(g) 5. Mod.
164.
2. St. Tr. 426.

† *Sec. 32.* It seems also that the confession of the defendant himself taken by the common law upon an examination before a *secretary of state* or other magistrate for treason (f), or other crimes (g) not within those statutes, may likewise be given in evidence against the party confessing.

Dyer 215.
4. St. Tr. 33.
3. St. Tr. 8.
Francia's
Trial, 1. St.
Tr. 68.

† *Sec. 33.* So also the confession of the defendant himself, made in discourse with *private persons*, hath always been allowed to be given in evidence against the party confessing.

† *Sec. 31.* But it is agreed that the confession of one person cannot be given in evidence against others.

1. State Tr. 265. But see the contrary

practised in *Ellis' Case*, 1. St. Tr. 341. *Throckmorton's Case*, 1. State Trials 63. 78. *Duke of Norfolk's Case*, 1. State Trial. *Earl of Essex' Case*, 1. State Trials 132. *Sir W. Raleigh's Case*, 1. St. Tr. 212.

† *Sec. 35.* It seems also that the confession of a prisoner taken by a magistrate on an examination and reduced into writing cannot be given in evidence until its identity be proved; for a confession being the strongest proof of guilt, requires the highest authenticity.

Sum. 263. 2. Hale 285.

† *Sec. 36.* And as the human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.

Warrick-shall's Case, Cases C. L. 222. *Gilb. L. E.* 137.

† *Sec. 37.* It also seems clear, that if the confession of a prisoner be taken upon oath, it cannot be read in evidence against him.

Bull. N. P. 242.

† *Sec. 38.* But it is adjudged, that if any facts arise in consequence of even such a confession, they may be given in evidence; because they must ever be immutably the same, whether the confession which disclosed them be true or false; and justice cannot suffer by their admission. The truth of these contingent facts, however, must be proved independently of, and not coupled with, or explained by, the conversation or confession from which they are derived.

Maxey's Case, Cases Cro. Law 224. *notis.*

† *Sec. 39.* But if a confession be voluntarily made and regularly proved on the trial, it is sufficient, if the jury believe it to be true, to convict the prisoner without any corroborating evidence to support it: But a confession does not amount to a conviction until the party plead *not guilty* in open court; for the trial of the confession must be by the petit jury.

Fisher's Case, Cases Crown Law 286.

Gilb. L. E. 137.

† *Sec. 40.* So also a person who by means of an extorted, and of course inadmissible, confession, is discovered to have purchased stolen goods, may, notwithstanding he was discovered

Rex v. Lockhart, Cases C. L. 300.

covered by means of such confession, give evidence against the principal felon.

Rex v.
B. Lambie
Croyden
Summer Assizes 1791, on
a case re-
served by
Mr. Justice
Willon.

† *Sec. 41.* But it hath been determined, that if a prisoner be taken before a magistrate on a charge of felony, and on his examination make a voluntary confession which the magistrate reduces into writing, and afterwards reads it over to the prisoner, who answers “*it is all true enough,*” but refuses to sign it, such written confession may be read in evidence, though not signed either by the prisoner or the justice; for a confession under such circumstances is admissible at common law, and the statutes of Philip and Mary make no alteration whatever respecting the admissibility of evidence: And accordingly in *Laver’s Case*, (a) the prisoner’s confession taken down before the privy council but not signed by him was admitted in evidence.

(a) 3. Mod.

(b) 5. Mod.
165.

Cont. 1. State
Trials 53.
Throckmor-
ton’s trial.

Sec. 42. It (b) seems an established rule, that wherever a man’s confession is made use of against him, it must all be taken together, and not by parcels.

Fearshire’s
Case, Cases
C. L. 184.
Rex v. J-
cocks, Cases
C. L. 254.
Trowton’s
Case, Easter
Term 8. Geo.
1. B. R.
12. Vinor 119.
(c) Bull. N. P.
298.
Meux v An-
fel, 3. Wil. 275.

† *Sec. 43.* It also seems to be agreed, that as the statutes of Philip and Mary positively enact, that the justices of peace shall take the examination of the prisoner and reduce the same into writing, the Court will presume that the confession of a prisoner was reduced into writing; for the law presumes that every man does his duty until the contrary be proved (c), and will not permit oral testimony of such confession to be given until it be proved that it was not put into writing as the statute requires; for it is a general rule, that no parol evidence of any fact shall be admitted where there is written evidence of such fact; for written evidence speaks for itself, is liable to no perversion or misconstruction, and is more accurate than memory can be, which is uncertain and fallible.

Hall’s Case,
Stafford Lent
Assizes 1750,
before the
Judges.

† *Sec. 44.* But if a confession be not taken in writing, parol testimony may be given of it, and the prisoner thereon convicted, although it is totally uncorroborated by any other evidence.

(d) *Kelynge*
18.
Sup. c. 25.
sect. 140.
1. Hale 304.
2. And. 67.
3. Inst. 25.

Sec. 45. Also it was (d) holden, that two witnesses of a confession of high treason, upon an examination before a justice of peace, were sufficient to convict the person so confessing, within the meaning of 1. Edw. 6. c. 12. and 5. and 6. Edw. 6. c. 11. which required two witnesses in high treason, “unless the offender should willingly without violence confess the same.” But this is remedied by

7. Will.

7. Will. J. c. 3. (1) which requires two witnesses, "unless the party shall willingly, without violence, in open court confess, &c."

(1) This statute prevents *such* confession, as above mentioned, from having the force of a conviction; but does not destroy the admissibility of it in evidence *for any purpose*, except to prove the overt-acts laid in the indictment. The overt-acts must still be proved by two lawful witnesses, notwithstanding the admission of any such confession as to collateral matters; for no confession unless made in open court, which in *Francia's case* was determined to mean upon the arraignment of the party, can be a sufficient ground for a conviction in treason. Foster 240 to 244. *Francia's Case*, 6. St.Tr. 58. *Willis's Case*, 8. St.Tr. 254. 255. 262, 263. Sed vide *Berwick's Case*; Foster 11.

As to THE FIFTH POINT, *viz.* Of parol evidence; and how far *hearsay* shall be admitted.

Sec. 46. It seems (a) agreed, that what a (b) *stranger* has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination; and therefore it seems a settled rule, that it shall never be made use of but only by way of inducement (c) or *illustration* of what is properly evidence.

(a) 2. St. Tr. 332. 414, 415. 761. 802, 803. 3. St.Tr. 145; 210. 252. 4. St.Tr. 333. (b) Vide sup. sect. 3. (c) 2. State Trials 325.

Sec. 47. Yet it seems, (d) that what the prisoner has been heard to say at another time, may be given in evidence for him, (2) as well as against (e) him.

(d) 4. St. Tr. 333. 3. St.Tr. 254, 255. (e) Vide sup. sect. 3.

(2) The declarations of a prisoner may be given in evidence against him, but not for him; therefore a witness, for this purpose, cannot be called in his defence; but he may cross-examine any of the witnesses on the part of the prosecution as to any thing which they may have heard him say relating to the fact he is charged with. Bull. N. P. 294.

Sec. 48. And also, (f) what a witness hath been heard to say at another time, may be given in evidence in order either to invalidate or confirm the testimony which he gives in court.

† *Sec.* 49. In the case of murder also, what the deceased was heard to say after the mortal wound was given, and in the extremity of death, may be given in evidence on the trial of an indictment against the murderer.

Rex v. Ely, coram KING C. J. O. B. 1720, Cases Cro. Law, 2d edit. 363. 397. 3. Burr. 1253.

† *Sec.*

Clymer v.
Littler,
3. Burr. 1245.

† *Sec.* 50. So also in ejectment, where a will was produced on the part of the plaintiff, subscribed by three witnesses, two of whom were dead, and the third witness on her cross-examination swore that while she was attending one of the deceased witnesses in his last illness, and about three weeks before his death, he pulled the will in question from his bosom and acknowledged and declared to her that the said will was forged by himself, this was held good evidence.

Drummond's
Case, Cases
C. L. 275.

† *Sec.* 51. But the declaration of a *convict* at the place of execution cannot be given in evidence as the declaration of a dying man; for the principle upon which these declarations are received is, that the mind of the person dying, impressed by the awful idea of approaching dissolution, acts under a sanction equally powerful as that which it is presumed to feel by a solemn appeal to God upon an oath; but an attainted convict is not an admissible witness even on oath.

As to THE SIXTH POINT, *viz.* Of written evidence; and whether *similitude of hands* shall be admitted.

(a) 3. State
Trials 213.
216. 217.
226. 230.
(b) 3. St. Tr.
762 to 767.
(c) Vide 3. St.
Tr. 892, 893.
4. St. Tr. 271,
272. and
Francis's
Trial.
Ed. Raym. 39.
Theory of
Evidence 25,
26. 12. Viner 204. *Quare* vide Skinner 579.

Sec. 52. It is observable, that similitude of hands with other circumstances, in (a) *Algernon Sidney's Case*, was ruled to be good evidence, of his having written a paper charged against him as an overt-act of high treason: Yet in the trial of *the seven* (b) *Bishops*, the Court was divided in opinion, whether similitude of hands were evidence of the defendants having signed the paper charged against them as a libel; and the parliament having declared an opinion, in the reversal of *Algernon Sidney's* attainder, that comparison of hands is no evidence of a man's hand-writing in criminal cases, it seems to have been generally holden (c) since that time, that it is not evidence in any criminal case, whether capital or not capital.

Stranger v.
Searle Sit. Mas.
33. Geo. 3.
Espinalis.
N. P. 14.

† *Sec.* 53. And therefore in an action against the acceptor of a bill of exchange, where the defence was, that the acceptance was a *forgery*, and a person employed by the Post-Office to detect forgeries in franks was produced to prove the forgery, who acknowledged that, as he had never seen the defendant write, he could only judge by comparison of hands, his testimony was rejected.

† *Sec.*

† *Sec. 54.* But a clerk in the Post-Office accustomed to inspect frunks for the detection of forgeries, may be examined as a witness to prove that the hand-writing of an instrument is an imitated and not a natural hand, though he never saw the supposed person write, and also to prove that two writings suspected to be imitated hands were written by the same person.

† *Sec. 55.* It has been held, that papers found in the custody of a person indicted for high treason relating to the treason with which he is charged, may be read in evidence against him on his trial (a) to prove an overt-act of levying war (b), although they are not any part of the overt-acts which are to support the species of treason charged upon him (c); but it seems that his hand-writing ought to be first proved by persons who have seen him write (d), or by the evidence of an agent who has received letters from and done business for him, believing it to be his hand-writing, (e) or by evidence of a complete admission by the prisoner that they are his hand-writing (f).

(a) *Ld. Preston's Case*, 4. St. Tr. 449. 447.
(b) *Francis's Case*, 6. St. Tr. 63.
(c) *Hensley's Case*, 1. Burr. 644.
(d) 1. Burr. 650. See vide 6. St. Tr. 282. con.
(e) *Layer's Case*, 6. St. Tr. 275. (f) *Layer's Case*, 6. St. Tr. 276.

† *Sec. 56.* So also letters wrote and forwarded on their way for the purpose of a treasonable correspondence, but intercepted, may be read in evidence to prove the treason.

† *Sec. 57.* It hath also been held, that on an indictment for perjury against a witness for what he swore at a trial, *the possea* is good evidence that there was a trial, so as to introduce the words spoken on which the perjury is assigned.

† *Sec. 58.* It seems agreed, that if perjury be assigned on an answer in chancery, the copy of the answer is not sufficient, but that the original must be produced (g); but it is sufficient to prove the defendant's hand-writing to the answer, and the master's hand-writing to the jurat as being sworn before him (h), without proving the identity of the person who swore it, or that any person at all swore it (i).

† *Sec. 59.* It seems also to be a general rule, that the final sentence, decree, or judgment of any court which has competent jurisdiction of the subject, is conclusive in any other court of concurrent jurisdiction; and therefore an acquittal on a charge of murder in *Spain* may be pleaded in bar of an indictment for the same offence in *England*.

† *Sec.*

Duchess of
Kingston's
Case, Cases
C. L. 132.
See also Ro-
bins v.
Crutchley,
2. Willf. 122.
Cross v. Sal-
ter, 3. Term
Rep. 639.

† *SecT.* 60. But it has been determined, that a sentence of justification in the spiritual court in *England* is not conclusive evidence against an indictment for bigamy in the common-law courts, for that its validity may be impeached, as having been obtained by fraud. It seems however, (a) that the sentence of the spiritual court is of itself, without producing the libel and all the proceedings, good *prima facie* evidence of a divorce *à mensa et thoro*.

(a) *Stedman v. Gooch*, Sitt. Easter 33. Geo. 3. Espinasse Nisi Prius 6.

Rhodes' Case,
Cases Crown
Law.

† *SecT.* 61. It hath been held, that the muster-book of the Navy Office is good evidence, on an indictment for forging a seaman's writ, to prove the identity of the supposed testator.

Aicle's Case,
Cases Crown
Law.

† *SecT.* 62. It hath also been held, that the *Daily-Book* kept by the clerk of the papers of the gaol of NEWGATE is good evidence, on an indictment against a prisoner for returning from transportation, to prove the precise day on which he was discharged.

Rex v. Holt,
Mich. 34. Geo.
3.
5. Term Rep.
436.

† *SecT.* 63. It hath also been decided, that the *Gazette* is evidence of all acts of State; and therefore in an information for a libel, a Gazette in which it was stated that certain addresses had been presented to the king from different bodies of subjects expressing their loyalty, &c. was good proof of an averment, "that divers addresses, &c." had been presented to his majesty by divers of his loving subjects, &c.

Rex v. Peck,
2. Stra. 716.
Allen v.
Thomas,
Espin. Dig.
777.

† *SecT.* 64. It is also a general rule, that every written or printed paper, or instrument, which are required to be stamped, cannot be admitted in evidence unless they are properly stamped; but it seems, that if the amount of the duty be paid, the Court will admit an instrument to be given in evidence, though not stamped with the proper stamp which such instrument requires, as where a *lease* was stamped on an *agreement*, the stamp duty being the same on both instruments.

Rex v.
Hawkeswood,
Cases C. L.
221.

† *SecT.* 65. And it hath been decided, that on an indictment for forging a negotiable bill of exchange, the bill may be given in evidence, though not stamped pursuant to the statutes of 23. Geo. 3. c. 49. f. 14. and 23. Geo. 3. c. 58. f. 4. which enacts, "That no bill of exchange, &c. not stamped as these acts direct, should be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or equity;" for the stamp acts are.

are reverent^s the laws, and do not purport to alter the nature of crimes; or the evidence by which they are to be proved.

As to THE SEVENTH POINT, *viz.* How far it is necessary for the evidence to be *the best evidence* that the nature of the thing admits.

† *Sect. 66.* It is a general rule, that no evidence which *ex natura rei* supposes there is still better evidence in the possession or power of the party shall be admitted; and therefore where it appears that any fact or agreement is reduced into writing, no parol evidence of it shall be given, unless it appear that such writing has been lost without any fault in the party, and in this case a copy of such writing, on being the next best evidence of it, shall be admitted; and if no copy were taken, then its contents may be proved by *viva voce* testimony.

Bull. N. P.

294.

3. Will. 275.

2. Stra. 1261.

† *Sect. 67.* It was formerly held, that if a defendant in a criminal prosecution was in possession of any written document or paper, and refused, on notice so to do, to produce it, that the prosecutor could not give a copy of its contents in evidence; but it is now settled, that there is no distinction, in this respect, between civil and criminal cases, and that a prosecutor may, without having given notice to produce the original writing, give attested copies, or, if no copies are taken, parol evidence of it in evidence; and on this ground parol testimony of a bill of exchange has been admitted on an indictment for forging it, on its being proved to be in the prisoner's possession (*a*). So also an attested copy of a letter directed to a prisoner, containing a *challenge*, may be given in evidence on a trial for murder, if sufficient proof be laid before the Court to raise a presumption that the original reached his hands (*b*).

4. Burr. 2483.

See Espinasse's Cases at

Nisi Prius 50.

Attorney-General v.

Le Merchant,

2. Term Rep.

201.

(c) Aicle's

Case, Cases

C. L. 241.

(d) Gordon's

Case, Cases

C. L. 245.

notis.

† *Sect. 68.* It is also a general rule, that copies are admissible evidence where the originals are of a public nature (*c*); as the journals of the two houses of parliament (*d*); the transfer-books of the East India Company (*e*); the poll-books of an Election (*f*); the city books of the boundaries of public markets (*g*); the rolls of a court-baron (*h*); the customary of a manor (*i*); the parish-register of christenings, marriages, and burials (*k*); the public books and papers of a corporation (*l*); the Daily-Book kept by the clerk of the papers of the prison of *Newgate* (*m*).

(c) 3. Salk.

154.

(d) Doug.

569. 572.

(e) Doug.

572.

(f) 1. Stra.

387.

(g) 2. Stra.

954.

Salkeld 201.

(b) Bull. N. P. 247. (i) 1. Term Rep. 466. (k) 2. Str. 1073. Sed vide Bull. N. P. 247. (l) 1. Str. 93. 401. (m) Cases C. L. 330.

† *Sec. 69.* It is also a general rule, that where it is necessary to prove that a person is in a public capacity, as an officer of the Post-Office (*a*), a farmer of the post-horse duty (*b*), a beneficed clergyman (*c*), an attorney (*d*), an excise or custom-house officer (*e*), a captain of a man of war (*f*), a constable (*g*), it is sufficient to shew that they acted upon the occasion as officers in their respective capacities, without producing the written instrument by which they were severally appointed.

(*a*) 2. Str. 1005.
 (*b*) 3. Term Rep. 632.
 (*c*) 3. Term Rep. 635.
 (*d*) 4. Term Rep. 366.
 (*e*) Cafes Cro. L. 278. *notis.*
 (*f*) 1. Show. 6. (*g*) Gordon's Cafe, Cafes C. L. 412.

As to THE EIGHTH POINT, *viz.* Whether *husband and wife* may be witnesses for or against one another.

Sec. 70. It seems (*b*) agreed, that husband and wife being as one and the same person in affection and interest, can no more give evidence *for* one another in any case whatsoever than for themselves; and that regularly the one shall not be admitted to give evidence *against* the other, nor the examination of the one be made use of against the other, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case :

(*b*) Co. Litt. 6. 112. 187.
 2. R. Ab. 686.
 2. Hale 279.
 2. Ven. 79.
 2. Term Rep. 265.
 4. Term Rep. 679.

Sec. 71. And therefore it hath been (*i*) adjudged, that the husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage, on an indictment on the statute of 1. (*k*) Jac. 1. c. 11. for a second marriage.

(*i*) Raym. 1. and the same point was admitted in Fielding's trial St. Tr. vol. 4. f. 754. (*k*) Vide B. 1. ch. 43.

† *Sec. 72.* So also where a settlement was claimed by a person as the wife of *J. W.* and after a proof of a marriage in fact, the wife of *J. W.* was called to prove a previous marriage to her, the wife was rejected as an incompetent witness, because her evidence went to criminate her husband by proving him guilty of bigamy.

Rex. v. Cliviger, 2. Term Rep. 263.
 S. P. 2. Lord Raym. 752.

† *Sec. 73.* So also if a husband be charged with having concealed his effects as a bankrupt contrary to 5. Geo. 2. c. 30. his wife cannot be examined as to any thing that may tend to criminate him.

Field v. Curtis, Cowp. 829.

† *Sec. 74.* So also it seems, that in questions between other parties, the evidence of a wife shall not be admitted, if it directly tend to charge or criminate her husband; but she may give evidence touching his estate.

Hill v. Hill, 2. Str. 1092.

Sec.

† *Sett.* 75. So in an information against two, one for perjury, and the other for subornation of perjury, in swearing, on the trial of an ejectment, that a child was supposititious, the husband of one of the defendants was admitted to give evidence of the birth, but his testimony as to the subornation of perjury was rejected. Sid. 377.
2. Keble 403.
Mar. 120.

† *Sett.* 76. But no other relations, as parent and child, brother and sister, &c. are excused from giving evidence for or against each other. Co. Lit. 6.
Sayer 45.
1. Will. 332.

Sett. 77. And some exceptions have been allowed to this general rule in cases of evident necessity. As in the *Lord Audley's Case*, (a) who held his wife's hands and legs while his servant, by his command, ravished her; the wife was admitted to give evidence against him. (a) State Tr.
v. l. 1. f. 388.
265. 209. 366.
Hutt. 116.
Ruthw. Col.

lections, part 2. vol. 1. f. 94. 99. But this case is denied to be law, Raym. 1.

Sett. 78. So also where a man is indicted for a forcible marriage against the (c) purport of 3. Hen. 7. c. 2. the wife may be admitted an evidence against her husband. (b) Cro. Ca.
438.
State Trials
vol. 4. f. 588.

3. Keble 193. pl. 43. (c) See Felonies by Statute, bk. 1.

† *Sett.* 79. And it seems also, that on an indictment for a forcible marriage, the wife is an admissible witness for her husband; as to prove that the elopement and marriage were voluntary and not forced. Rex v. Perry,
at Bristol,
1794.

Sett. 80. So also where either a husband or wife have cause to demand (d) sureties of the peace against the other, each may give evidence against the other of the cause on which such sureties are demanded. (d) See B. 1.
c. 60. sect. 4.
Hutt. 116.

See Rex v. Mary Mead, 1. Buttr. 542.

† *Sett.* 81. So in an indictment against a husband for an assault on his wife, the wife is an admissible witness against him. Rex v. Azir,
1. Stra. 633.

† *Sett.* 82. But it does not seem to be clearly settled, whether a wife may be admitted as a witness against her husband in high treason. Raym. 1.
1. Brownl. 475.
1. Hale 301.

As to THE NINTH POINT, viz. Whether a judge or juror may be a witness.

Sett. 83. It seems (e) agreed, that it is no exception against a person's giving evidence either for or against a prisoner, that he is one of the judges or jurors who are to try him. And in the case of *Hacker*, two of the persons in

the commission for the trial came off from the bench, and were sworn and gave evidence, and did not go up to the bench again during his trial.

As to THE TENTH POINT, *viz.* Whether a *counsel* or *attorney* may be a witness.

† *Seet.* 84. It is a rule of law, that counsel and attorneys ought not to be permitted to give evidence of any facts communicated to them by their clients in the practice of their profession; for that it is contrary to the policy of the law to permit any person to betray a secret with which the law has intrusted him: But this is to be considered as the privilege of the client, and not of the counsel or attorney, and is confined to such facts as have been communicated to them respectively in receiving professional instruction in the cause in which they are retained.

Lindsay v.
Talbot, Str.
140.
Bull. N. P.
284.

† *Seet.* 85. A counsel or attorney therefore may give evidence of facts which they knew before they were retained.

Bull. N. P.
284.

† *Seet.* 86. So also a counsel or attorney may be called to prove a fact of which they might have had knowledge without being retained in the cause; as whether a deed crafted was ever in a different plight; for that is a fact of their own knowledge, but they cannot disclose a confession of their client concerning it.

Bull. N. P.
284.

† *Seet.* 87. So also if a counsel or attorney be witness to a deed produced in the cause, he shall be examined as to the true time when it was executed.

Doe v. Andrews, Cowp.
845.

† *Seet.* 88. So also on an indictment for perjury in an answer in chancery, if the defendant's attorney was with him when he took the oaths, he may be called to prove the identity of the person; for this is collateral matter, and not communicated to him by his client professionally, but a fact which he might have known from his own observation.

Str. 1122.
Bull. N. P.
284.
Cowp. 846.
Espin. Dig.
717.

† *Seet.* 89. So also an attorney may be called merely to prove his client's hand-writing to a note or other instrument.

Espin. Dig.
719.

† *Seet.* 90. So also an attorney may be called to give evidence of facts communicated to him in a conversation between him and his client touching the justice of his suit after a compromise of the suit; for the purpose of the suit having

Cobden v.
Kendrick,
4. Term Rep.
431.

having been obtained, the communication was not made by way of instruction for conducting his cause.

† *SecT. 91.* And this privilege is strictly confined to persons acting in the situation of attornies, or counsel in the cause; and therefore if a person consult with an attorney as a friend, such attorney may be called upon to disclose the facts which came to his knowledge on such consultation; but if he be consulted as attorney, he cannot disclose facts communicated to him in any case whatever. Wilson v. Raf. tal, 4. Term Rep. 753.

† *SecT. 92.* So also this privilege of secrecy does not extend to persons of other professions, as physicians, surgeons, &c. Caesar Hawkins's Case, in the trial of the Duchess of Kingston, 11. State Trials 243.

† *SecT. 93.* But a clerk attending upon a grand jury shall not be allowed to reveal that which was given in evidence before the inquest. 12. Vin. Abr. 38.

As to THE ELEVENTH POINT, *viz.* How far an accomplice may be a witness.

SecT. 94. It has been long settled (*a*), that it is no exception against a witness that he hath confessed himself guilty of the same crime. if he have not been (*b*) indicted for it; for if no accomplices were to be admitted as witnesses, it would be generally impossible to find evidence to convict the greatest offenders. (a) 1. St. Tr. 96. 696, 697. 723. 2. St. Tr. 334. 501. 3. St. Tr. 161. 217, &c. 595. 698. 669.

4. St. Tr. 12. 33. 1. Hale 303, 304. See Hale's opinion to the contrary arguing. 1. St. Tr. 724. and Bracton 118. (*b*) 1. St. Tr. 96. 2. St. Tr. 501.

SecT. 95. Also it hath been often (*c*) ruled, that accomplices who are indicted, are good witnesses for the king, until they be convicted. (c) 1. St. Tr. 966. 4. State Tr. 12.

Kelynge 17, 18. 3. Koble 136. Vide vol. 1. fol. 697. 10. St. Trials 190.

† *SecT. 96.* It hath also been determined, that a prisoner may be legally convicted on the evidence of an accomplice, though unconfirmed by any other evidence (*d*). But it seems to be the general opinion, that unless some fair and unpolluted evidence corroborate and give verisimilitude to the testimony of an accomplice, a person convicted under such circumstances ought to be recommended to mercy. (d) Arwood's case, Cases C. L. 167.

Dr. Dodd's
Case, Cases
C. L. 141.

† Sect. 97. It seems also, that an accomplice may give evidence before a grand jury against a *particeps criminis*, though such accomplice be not previously admitted a witness for the crown, and was carried before the grand jury by a surreptitious and illegal order from the prison to which he had been committed for the same offence.

(a) 1. Sid. 237.
Vide Trial
per Pais 148.
Style 401.
12. Affize 12. Savil 34.

Sect. 98. Also it hath been (a) adjudged, that such of the defendants in an information against whom no evidence is given, may be witnesses for the others.

(b) 2. R. Abr.
685.

Sect. 99. It hath been also (b) adjudged, that where A. B. and C. are sued in three several actions on the statute for a supposed perjury in their evidence concerning the same thing, they may be good witnesses in such actions for one another.

Sayer 290.
Cowp. 199.

† Sect. 100. So also in an action of trespass, or in an information for bribery on the statute of 2. Geo. 2. c. 24. a *particeps criminis* is a good witness, though left out on purpose to enable him to give evidence, and though a recovery against the defendants in the action is a good bar, and in the information a good discharge of himself.

As to THE TWELFTH POINT, viz. Whether a person *attainted* or *convicted* may be a witness.

Sect. 101. It seems agreed, that a conviction, and therefore *a fortiori* an attainder or judgment of (c) treason, (d) felony, (e) piracy, (f) *præmunire*, (g) perjury, forgery (h) 5. Eliz. c. 14. and also a (i) judgment in attainr for giving a false verdict, or in conspiracy at the suit of the (k) king, and also (l) judgment for any (m) crime whatsoever to stand in the pillory, to be whipt or branded, being in a court which had a (n) jurisdiction, are good causes of exception against a witness, while they continue in force.

(c) 5. Mod. 16. 74.
Kelynge 33.
(d) Raym. 369.
Co. Litt. 6.
2. Bulstrode 154.
(e) 2. Roll. Ab. 686.
(f) Co. Lit. 6: (g) Raym. 32. Infra sect. 22, 23. Supra c. 37. sect. 52. Co. Lit. 6. Summary 263. (h) Co. Lit. 6. Vide sup. c. 43. f. 25. 33. H. 6. 55. 2. Hale 277. But Summary 263. it is said in general, that one attainr of forgery cannot be a witness. (i) Co. Lit. 6. 2. Roll. 684. (k) 33. H. 6. 55. 24. E. 3. 34. Vide 1. Hale 326. Sup. c. 43. f. 25. B. 1. c. 72. f. 9. Co. Lit. 6. 2. Hale 277. But Summary 263. it is said in general, that one attainr of conspiracy cannot be a witness. (l) That it is not material whether such judgment were actually executed, 2. Salkeld 689. 3. Inst. 219. 3. Levinz 426. But Co. Lit. 6. Kelynge 37. 38. Summary 263. 2. Hale 277. 5. Mod. 75. 76. seem to make the execution of the judgement material. (m) 2. Salkeld 689. 3. Lev. 426. This point is made a *quære*, 5. Mod. 15. 16. 75. 76. Skid. 178. 579. And it is said, that by the civil and canon law no such judgment disables a witness, unless the nature of the crime be infamous. 3. Levinz 426, 427. (n) 1. Sid. 51. Raymond 34.

† *Sec.* 102. And as the common punishment inflicted on the *crimen falsi* was THE PILLORY, it was formerly held, that no man who had been set on the pillory, whatever might be the cause, could legally be a witness (a): but the rigour of this rule is now reduced to reason (b), and it is now held, that it is the nature of the crime and not the species of punishment, which renders the party infamous and creates his disability of being a witness; and therefore a person convicted of barratry and fined, is incapacitated from being a witness, although not sentenced to the pillory (c); but where the sentence of pillory is passed, if the crime be of an infamous nature, it is not necessary that he should have actually stood there in order to render him an incompetent witness, for it is the judgment which creates the infamy, and not the infliction of the punishment (d).

(a) Co. Lit. 6.

Ball. N. P.

292.

(b) Gilb. L. E.

143.

Prin. P. L.

62.

(c) Rex v.

Ford, Salk.

690.

(d) Rex v.

Crosby, 2. Sal-

keld 689.

† *Sec.* 103. It hath been ruled, that a conviction of perjury doth not disable a man from making an affidavit in relation to the irregularity of a judgment in a cause where such person is a party; for otherwise he must suffer all injustice, and would have no way to help himself. But it can only be read in defence of a charge, and not in support of a complaint.

Davis's Case,

Salk. 461.

Walker v.

Kearney,

1. Stra. 1148.

Sec. 104. But it is (e) agreed, that no such conviction or judgment can be made use of to this purpose, unless the record be actually produced in court.

(e) 1. St. Tr.

268.

2. St. Tr. 307.

436. 455.

3. State Trials 425. 4. State Trials 130. Salk. 461.

Sec. 105. Also it is a general rule, that a (f) witness shall not be asked any question the answering to which might oblige him to accuse himself of a crime; and that his credit is to (g) be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he never was convicted.

(f) 2. St. Tr.

268. 472.

3. St. Tr. 387.

1010.

4. St. Tr. 44.

Con. Ruffw.

Stafford 605.

et ibid. 551.

one was not admitted to speak to clear himself. Nor are witnesses permitted to give evidence of their own infamy or turpitude. 3. St. Tr. 427. 4. Inst. 279. 2. Scil. Cases 175. Stra. 1148. Salkeld 461. 689. (g) Kelynge 38. 3. St. Tr. 256. 680. 4. St. Tr. 129. 3. St. Tr. 151. 267. 297. Quil. N. P. 291.

† *Sec.* 106. But on an application to bail a person accused of grand larceny, the Bail may be asked whether he has not stood in THE PILLORY; for his answer in the affirmative cannot subject him to any punishment. ✕

Rex v. Ed-

wards,

4. Term Rep.

449.

Sec. 107. It seems clear (h) at this day, that outlawry in a personal action is not a good exception against a witness, as it is against a juror.

(h) Co. Lit.

1. Hale 203.

But 34. H. 5.

32. pl. 2. taken notice of 2. R. Abr. 675. seems contrary.

Sec. 108. It also seems clear, that a person convicted of felony who is admitted to his clergy and (a) burnt in the hand, is thereby re-enabled to be a witness; for the burning in the hand operates as a statute pardon.
 (a) Sup. c. 33. sect. 129. c. 37. sect. 49.
 Ld. Raym. 370. 380.
 Godb. 288. Sty. 388. Kelynge 38. Vent. 349. Skinner 578. 5. Modern 15.
 2. Siderfin 51. Hobart 81. 11

Mackender's Case, 2. Will. + *Sec. 109.* But as a person convicted of petty larceny, not being liable to be burned in the hand, was disqualified from being a witness, although he had suffered the punishment inflicted on him, it is enacted by 31. Geo. 3. c. 35. "that a conviction of petty larceny shall not incapacitate a person from being a witness."

(b) Sup. c. 37. *Sec. 110.* It seems (b) agreed, that the king's pardon of treason or felony after a conviction or attainder, restores the party to his credit.

Reiley's Case, Cases Cro. Law 360. + *Sec. 111.* And it is decided, that the pardon of a person convicted on the statute of 31. Geo. 2. c. 10. for taking a false oath to obtain probate of a seaman's will, restores the convict to his competency; for that a pardon not only clears the offence itself, but all disabilities incident to it.

Sec. 112. Also it was holden by the late chief justice (c) s. Salk. 514. 689. (c) HOLT, that the king's pardon will remove a man's disability to be a witness in all cases whatsoever, wherein it is only the consequence of the conviction or judgment against him, and not an express part of the judgment, as it is in conspiracy (d) at the suit of the king, and in perjury on the statute. But this matter (e) seems not to be fully settled.
 But see 2. Bro. 47.
 (d) B. 1. c. 72. section 9.
 Hale thinks that a convict of conspiracy, perjury, or forgery, may be a good witness, if pardoned. 1. Hale 306. (e) Vide sup. c. 37. §. 52.

Gulley's Case, Cases Cro. Law 94. + *Sec. 113.* But it is settled, that where a convict has been pardoned, and afterwards produced as a witness and objected to on the ground of his having being convicted, he must produce his pardon under the Great Seal; for that letters under the king's sign manual are not sufficient, being rather evidence of the king's intention to pardon, than a pardon itself.

AS TO THE THIRTEENTH POINT, *viz.* How far an *interested person* may be a witness.

Sect. 114. FIRST, It seems to be an uncontested rule, in all cases whatsoever, that if a person is either to be a gainer or a loser by the event of the cause, whether such advantage be *direct and immediate*, or *consequential* only, he is incompetent to be a witness.

Co. Lit. 6.
1. Sid. 237.
1. Keb. 836.
1. Hale 302.
1. Hale 279.
Loft. Gilb.
221. 225. 2. Atk. 229. Peer. Wms. 239.

+ *Sect. 115.* Therefore a person who is bail for the defendant cannot be a witness for him without consent (*a*); for as he would become immediately liable on a verdict being given against the principal, he is directly and immediately interested (*b*).

(a) 3. St. Tr. 253.
(b) Per BULLER Justice, 1. Term Rep. 164.

+ *Sect. 116.* So also where an infant sues, his *prochein ami* cannot be a witness; for he is liable to the costs, and therefore immediately interested in the event of the cause.

Hopkins v. Neale, 2. Stra. 1026.

+ *Sect. 117.* So also in an information on a penal statute, where the informer is intitled to the whole or to part of the penalty, the informer is an incompetent witness, for he is directly interested in the event.

Rex v. Tilly, 1. Stra. 316.

+ *Sect. 118.* And for this reason a party injured cannot be a witness on an indictment for perjury on the statute of 5. Eliz. c. 9. because the statute gives him Ten pounds.

+ *Sect. 119.* But by 27. Geo. 3. c. 29. "The inhabitants of any place or parish are good witnesses, in actions on penal statutes, notwithstanding the penalty be given to the poor, or otherwise for the benefit of the parish or place, provided the penalty does not exceed Twenty pounds."

+ *Sect. 120.* By 1. Ann. c. 18. "Inhabitants of a county may be examined as witnesses on indictments for not repairing county bridges."

+ *Sect. 121.* By 8. Geo. 2. c. 16. s. 15. in actions brought on the *statute of Winton*, persons inhabiting within the hundred may be witnesses."

+ *Sect. 122.* So also all those persons who by several acts of parliament are intitled to rewards on the conviction of offenders are competent witnesses, notwithstanding the rewards.

Onfl. N. P. 257.
Espinaff. N. P. 713.

Rex v. Whitney, 283. **† Sect. 123.** SECONDLY, It seems also to be agreed, that a person who is only consequentially interested in the event of a cause, is an incompetent witness.

Sect. 124. It was formerly ruled, that he who by a slight had been imposed upon to set his hand to a note for more money than he intended, was no good witness on an information for the same; because the conviction might be a means to avoid the note, by being made use of by the party when sued upon it, as a motive to *influence* the jury, which cannot well be prevented, though in law it be no evidence. **†** And some other cases of the same sort have been decided on the like principle (*a*). But it seems now to be settled, that to destroy the *competency* of a witness he must have an *interest*, and that where there is *influence* only, it shall only go to his credit (*b*).

(*a*) **Rex v. Jones,** 2. Stra. 1041.
Rex v. Ellis, 2. Stra. 1104.
(*b*) 4. Burr. 2255.

Corporation of Carpenters in Shrewsbury v. Haywood, Douglas 359. **† Sect. 125.** As where an action is brought against a person for following a trade in a corporation without being a freeman, contrary to the custom of the corporation; another person who has carried on a trade under the like circumstances cannot be admitted to give that fact in evidence in order to disprove the custom, because, having been guilty of a breach of it, he would, in *consequence* of the custom being disproved, exonerate himself from the liability of an action.

Rex v. Blackman, Sitt. Hilary Term, 14 Geo. 3. **† Sect. 126.** So also on an information where the statute of 17. Geo. 2. c. 40. against embezzling naval stores, gives a moiety of the penalty to the informer, but leaves it in the discretion of such judge to inflict a corporal punishment in lieu of such penalty; yet if a witness acknowledge on a *voir dire* that he expects a part of the penalty in case the defendant is convicted, he is an incompetent witness, although his interest is only consequential on the penalty being recovered.

Rex v. Elen, Sitt. Hilary Term, 34 Geo. 3. **† Sect. 127.** So also on an indictment at common law, for perjury on the trial of a civil action, the party against whom the verdict was given in such action cannot be a witness on the indictment, until he has paid the debt and costs in the action; for if the defendant is convicted on the prosecution for perjury, he might obtain relief in a court of equity against the judgment in the civil action; and therefore the conviction of the defendant being a means of relieving himself from such judgment, he has a *consequential interest* in the event of the prosecution that renders him incompetent.

† *Sec. 128.* But it seems to be clearly agreed, that a witness shall not be taken to have such a consequential interest in the event of a prosecution as will destroy his competency, unless the judgment in the criminal prosecution on which he is examined, may be given in evidence either for or against him in a civil action on the same subject; and therefore it hath been decided upon great deliberation, contrary to former determinations on the subject, that the borrower of money on a pawn at usurious interest is a competent witness, in an action for usury against the pawnbroker, to prove not only the re-payment of the money, but the usurious transaction, for the judgment in this action could not be given in evidence against him in an action to recover the money lent.

Per Lord Mansfield, in the case of *Abrahams v. Bunn*, 4. Burr. 1255.

Bull. N. P. 288, 289.

† *Sec. 129.* But if the lender of money, on such action being brought against him, produce a security, or prove the pledge to be remaining in his custody, it seems that the borrower cannot be examined to contradict this (a); and therefore it has been determined, that if it appear upon the *voir dire* of the borrower that he is a bankrupt and has not repaid the money borrowed, and obtained his certificate, he cannot be a witness in a *qui tam* action against his assignee, notwithstanding he is ready to release to his assignee all benefit which may arise from the discharge of this debt in particular, and all claim to surplus and allowance in general, and notwithstanding the assignee has proved his demand for the money lent under the commission.

(a) 4. Burr, 2256.

Masters qui tam v. Drayton, 2. Term Rep. 496.

† *Sec. 130.* THIRDLY, But the interest to render a witness incompetent must be a certain benefit or advantage arising to him from the event of the cause, or a certain charge or loss to which he may be liable; for a future or contingent interest, or a future or contingent loss which he may derive or suffer from the event of the cause, will not render him incompetent.

Peer. Wms. 287. 1. Term Rep. 163. Doug. 134.

† *Sec. 131.* Therefore on an indictment for forging a bank note, signed in the usual form by one of the Cashiers &c. viz. "For the Governor and Company of the Bank of England, W. L." the cashier is a competent witness to prove that the name subscribed is not his hand-writing; for the cashier, by signing the note, does not make himself immediately responsible.

Newland's Case, Cases C. L. 256.

† *Sec. 132.* FOURTHLY, A remote or trifling interest shall not destroy the competency of a witness.

† *Sec. 133.* And therefore it seems agreed, that it is no good exception against a witness, that he has a maintenance from

2. St. Tr. 334. 691.

from the king; for every one may maintain his own witness.

† *SecT. 134.* So also it hath been adjudged to be no good exception against a witness, that he has received a reward for having made a discovery of the crime to be proved against the prisoner.

(a) *Kelynge* 18. *SecT. 135.* Also it hath been (a) ruled to be no good exception, that a witness hath the promise of a pardon or other reward on condition of giving his evidence, unless such reward be promised by way of contract for giving such and such particular evidence, or full evidence, or any way in the least to bias him to go beyond the truth; which not being easily avoided in promises or threats of this kind, it is certain that too great caution cannot be used in making them.

Fotheringham v. Greenwood, 1. Str. 129. † *SecT. 136.* FIFTHLY, If a witness think himself interested, although in point of fact he is not, he should not be examined as a witness.

1. Term Rep. 296. † *SecT. 137.* SIXTHLY, But it is an established rule, that a person who has signed a deed, or any negotiable instrument for the payment of money or performance of a duty, shall not be permitted to give testimony to invalidate it.

Dr. Dodd's Case, Cases C. L. 144. Loft. Gilb. 222. 232. Bull. N. P. 288. † *SecT. 138.* Therefore it has been held, that the person whose name is forged to a bond, cannot, on an indictment for the forgery, be admitted to prove that the name signed is not his signature, except he has a release from the supposed obligee of the bond.

Ruffell's Case, Cases C. L. 8. † *SecT. 139.* So also on an indictment for forging a receipt for the payment of money, the person whose name is signed to the receipt is not an admissible witness to prove the forgery.

Rex v. Rhodes, 2. Stra. 728. Parr's Case, Cases C. L. 345. † *SecT. 140.* So also on an indictment for forging a letter of attorney whereby the prisoner transferred stock, the proprietor of the stock is not a competent witness to prove the forgery; but it seems, that he may be admitted to prove the amount of the stock and the interest that was due.

Waller v. Sheller, 1. Term Rep. 296. † *SecT. 141.* So where A. the indorsee of a promissory note indorsed it to B. who gave it up to C. in consideration of his bond given for the amount of it, and on an action on this bond being brought against C. the defendant produced A.

as a witness to prove that the consideration given for the note was usurious; the Court decided, that the indorser of a note, independent of any question of interest, could not be permitted to prove a note void which he himself had indorsed.

† *Sec. 142.* But where the person whose hand is forged *Bull. N. P.* is not directly interested in the question, he may be admitted ^{289.} to prove the forgery; as in the case of *Rex v. Wills*, who was indicted for forging a receipt from a mercer at *Oxford*, the mercer having before recovered the money in an action against *Wills*, he was admitted to prove the forgery.

SEVENTHLY, In criminal cases, witnesses though apparently interested are admitted from necessity.

† *Sec. 143.* As in an indictment for a cheat, by imposing on *A. B.* a spurious liquor as genuine port wine, *A. B.* is a competent witness; for as such cheats are seldom practised except between the parties themselves, they would otherwise be committed with impunity. *Rex v. M'Carry*, *Salk. 286.*

† *Sec. 144.* So where the indictment charged the defendant with tearing a note in which the defendant promised to pay so much to *A. B.* the payee of the note was admitted a witness, although it was objected that he was swearing to set up his own demand. *Rex v. Moise*, *Str. 595.*

† *Sec. 145.* So also it is said, that if an indictment charge the defendant with having defrauded a woman of a bond or note, by persuading her that he could secure the affections of a man she loved by a certain spell or charm, the woman is a competent witness, although her evidence tends to destroy the validity of the bond or note, by shewing that it was given for an illegal consideration. *Per Holt, Chief Justice. 7. Mod. 119.*

† *Sec. 146.* So on an indictment for an assault, the person assaulted is a competent witness to prove the assault, although he has laid a wager that he would convict the defendant. *Rex v. Fox*, *1. Str. 652.* *See 3. Term Rep. 27.*

† *Sec. 147.* In an action also on the *statute of Winton* *Bull. N. P.* against the hundred, the party robbed may himself be a ^{289.} witness.

AS TO THE FOURTEENTH POINT, *viz.* How far *Religious Sectaries* may be witnesses.

† *Sec. 148.* It seems agreed to be a good exception that a witness is AN INFIDEL; that is, as I take it, that he believes

believes neither the Old nor New Testament to be the word of God; on one of which our law requires the oath should

(a) It is said be administered (a).

by Lord Coke, that an *infidel* cannot be a witness, Co. Lit. 6. and the construction which HAWKINS has made upon this passage is warranted by the same authority. 2. Inst. 479. 3. Inst. 165. 4. Inst. 279. See also Fleta bk. 5. c. 22. p. 344. Bract. 116. But LORD HALE doubts whether it be essential to the validity of an oath, that it should be taken upon the Old or New Testament, 2. Hale 279. And it is now settled, that all persons professing to believe in A GOD, though neither believing in the Old or New Testament, may be witnesses, if sworn according to the ceremonies of their own religion. 1. Atk. 21. 2. Eq. Abr. 397. 1. Wils. 84. Co. Lit. 6. note (2). Cowp. 390.

Omichund v. Barker, 1. Atk. 21. 1. Atk. 46. † *Sett.* 149. It has been determined, that a subject of the *Great Mogul* professing the *Gentoo religion*, sworn according to the ceremonies of that religion, is an admissible witness; for the *Gentoo*s believe in a God as the creator of the universe, and that he rewards those who do well, and punishes all those who do ill.

Fackenor v. Sabine. † *Sett.* 150. So also a *Moor* sworn upon the *Koran* according to the ceremonies of the Mahometan religion, is a good witness.

1. Atk. 39. † *Sett.* 151. And it is said; that a *heathen* has been admitted a witness.

Dutton v. Cole, 1. Sid. 6. † *Sett.* 152. It hath also been determined, that a covenantor who, instead of being sworn in the usual manner by laying his right hand on the New Testament and afterwards kissing it, takes an oath by causing the book to be held open before him, and lifting up his right hand, takes as strong an oath as any other witness: the form of the oath in this case is, "You swear, according to the custom of your country and the religion you profess, that the evidence you shall give between our sovereign lord the king and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth, so help you, God."

Mildrone's Case. Cases in Cro. Law 319. † *Sett.* 153. And it is now settled, that A JEW may be sworn in a criminal case on the *Pentateuch*, according to the ceremonies of the Jewish religion; and it is said, that this practice is the ancient usage of the common law, and that Jews were thus sworn prior to the eighteenth year of Edward the first, when they were expelled the kingdom.

1. Atk. 27. † *Sett.* 154. But it is said, that an *atheist*, who has no belief of a God, and an imprecation of the Divine Being upon him if he swear falsely, cannot be a witness; for persons denying the being or attributes of the Deity, cannot consider themselves as bound by the obligation of an oath, and therefore are not credible.

Bull. N. P. 102.

Sett.

† *Sect. 155.* So also if it appear that a person has no idea of a God or religion, is altogether ignorant of the obligation of an oath, a future state of rewards and punishments, the existence of another world, or what becomes of wicked people after their death, he ought not to be sworn: but a person sworn on the New Testament, who on being asked if he believed in the holy gospels, answered, after some prevarication, that he believed in them as far as he understood them, was allowed to give evidence. White's Case, Cases Cro. Law. See Lec v. Lec, 1. Atk. 43. 45. Ld. Kenyon, Sitt. after Hilary 1791.

† *Sect. 156.* And it is held, that *persons excommunicated* cannot be witnesses, because being excluded out of the church, they are supposed not to be under the influence of any religion. Buller 192. 3. Black. Com. 101.

† *Sect. 157.* The statute 3. Jac. 1. c. 5. enacts, "That every *popish recusant convict* shall stand to all intents and purposes disabled, as a person lawfully excommunicated," and therefore *Lord Coke* refused to admit them as witnesses between party and party (a); but it is said, that this is too severe, and that the purport of the statute is satisfied by the disability to bring an action. (a) 2. Bull. 155. Bull. N. P. 293.

† *Sect. 158.* But by 7. and 8. Will. 3. c. 34. f. 6. which allows the *affirmation* therein described to be accepted instead of an *oath*, it is enacted, "That no *quaker* or *reputed quaker* shall by virtue of this act be qualified or permitted to give evidence in any criminal causes, &c."

† *Sect. 159.* And on this statute it hath been decided, that a *quaker* is not an admissible witness upon making an affirmation in an appeal of murder (b), or on a motion for an attachment for not performing an award (c), on a motion for an information for a misdemeanor (d), or on exhibiting articles of the peace (e). (b) 2. Stra. 854. (c) 1. Stra. 441. (d) 2. Burr. 1117. (e) 1. Stra. 527.

As to THE FIFTEENTH POINT, *viz.* How far infants, aliens, and persons deaf and dumb, may be witnesses.

Sect. 160. It is (f) certain, that want of discretion is a good exception against a witness; on which account alone (g) it seems, that an *infant* may be excepted against; for in some cases an infant of nine years of age has been allowed to give evidence. (f) Co. Litt. 6. (g) Sum. 263. 2. Hale 278. 1. Brownl. 47. Foster 70.

† *Sect. 161.* And in the case of a rape committed upon a female infant of such tender years that she has not sufficient understanding to be admitted to give testimony on oath, it was formerly held, that the information she gave to others of the facts and circumstances might

bc

be given in evidence by those to whom she made the communication (a), but this was never practised but upon extraordinary occasions (b), and the doctrine was soon overruled (c); and it is now settled, that if an infant appear, by answers to questions propounded by the Court for the purpose, to entertain sufficient sense of the danger and impiety of falsehood, she may be sworn and examined, however young in years she may be (d); but that unless infants have such sufficient discretion, they cannot give their testimony; for no evidence can be received, under any circumstances, except upon oath (e).

(a) 1. Hale 302. 634.
2. Hale 279.
(b) 11. Mod. 228.
2. Hale 278.
(c) 1. Atk. 29. Rex v. Powell, Cases Cro. Law 104.
1. Stra. 700.
(d) Brasier's Case, Cases Cro. Law 182. (e) S. C. Bull. N. P. 293.

(f) 1. St. Tr. 253. *Sec. 162.* But it seems agreed, that it is no good (f) exception against a witness, that he is an alien, or villein, or bondman, &c.

Ruffon's Case, Cases C. L. 316. *+ Sec. 163.* Also it seems, that a man deaf and dumb, with whom communication can be made by means of signs, &c. may be admitted to give material evidence against a prisoner. See also Jones' Case, Cases C. L. 97.

AS TO THE SIXTEENTH POINT, *viz.* In what manner witnesses are to give their evidence.

(g) 2. Hale 283. *Sec. 164.* It hath always been (g) agreed, that the evidence for the king must in all cases be upon oath, and also that the evidence for the defendant in an (h) appeal, whether capital or not capital, or in an indictment or information for a (i) misdemeanour, must also be upon oath. And it is said by Sir Edward (k) Coke, "That we never read (j) 1. Siderfin 211. "in any statute, ancient author, book case, or record, that (k) 3. Inst. 79. "in criminal cases the party accused should not have witnesses sworn for him, and therefore that there is not so much as *scintilla juris* against it." And it is said by Sir (l) Matthew Hale, that there is no known law against it.

(l) 2. Hale 283.

(m) C. Car. 292. *Sec. 165.* However, there having been a constant immemorial (m) practice not to suffer witnesses to be sworn against the king upon indictments of capital crimes (n), except in some cases specially provided for by statute; and the judges being always tender of departing from the settled practice of their predecessors, and generally choosing rather to presume it originally founded on some statute or other good foundation, than to suffer the reasonableness of it to be nicely inquired into, which might be an inlet to endless uncertainties; it was thought necessary to enact by 1 Ann. c. 9. s. 3. "That every person who shall be produced or appear as a witness on the behalf of the prisoner, before
" he

(n) 1. St. Tr. 147.
2. St. Tr. 296.
717.
(n) Vide 31. El. c. 4.
4. Jac. c. 1.

" he or she be admitted to depose, or give any manner of evidence, shall first take AN OATH to depose *the truth, the whole truth, and nothing but the truth*, in such manner as the witnesses for the queen are by law obliged to do ; and if convicted of any wilful perjury in such evidence, shall suffer all the punishments, penalties, forfeitures, and disabilities, which by any of the laws and statutes of this realm, are or may be inflicted upon persons convicted of wilful perjury."

† *Seet.* 166. It seems, that peers of the realm have no privilege in criminal cases (*a*), as they have in civil cases, (*a*) 3. Keb. 61. of being examined upon their *honour* (*b*), but that the evidence they give as well before the grand jury as the petit jury, must be upon *oath* (*c*), and if they refuse to be sworn, may be fined and committed for a contempt of the Court (*d*). (*b*) (*c*) (*d*) 1. Salk. 278.

† *Seet.* 167. It is said also, that it is not sufficient for a witness to depose " as he thinks or persuades himself : " Dyer 53. *notis.*
FIRST, Because the Court must give an absolute sentence, and therefore ought to have more sure ground than thinking. SECONDLY, Because the witness cannot be prosecuted for perjury (*e*). THIRDLY, Because the judges, as judges, are always to give judgment *secundum allegata et probata*, notwithstanding private individuals *think* otherwise. (*e*) *Sed vide* 2. Hawk. ch. "Perjury" contra.

† *Seet.* 168. It seems also, that a witness shall not be permitted to read his evidence (*f*), but he may refresh his memory from any book or paper, if he can afterwards swear to the fact from his own recollection ; but if he cannot swear to the fact from recollection any farther than as finding it entered in a book or paper, the *original* book or paper must be produced (*g*). (*f*) 5. St. Tr. 445. (*g*) Philips v. Perkins, 3. Term Rep. 749.

† *Seet.* 169. It is a general rule, that a witness cannot be asked any question the answering of which may oblige him to accuse himself of a crime, or subject him to penalties or punishment ; and therefore a witness may be asked *if he has ever stood on the pillory*, for the answer cannot subject him to any punishment. 7. Mod. 119. Rex v. Edwards, 4. Term Rep. 440.

AS TO THE SEVENTEENTH POINT, *viz.* In what manner witnesses are compellable to attend.

Seet. 170. I take it, that in prosecutions for (*h*) misdemeanors the defendant may take out *subpoena's* of course ; (*h*) 1. State Tr. 969. 3. State Tr. 238. 252. 420. but

(a) Vide 1. but that in capital cases he hath no (a) right, by the common law, to any process against his witnesses without a special order of the Court. And it is said in *Turner's Case* (b);
 St. Tr. 969. mon law, to any process against his witnesses without a
 3. St. Tr. 1002. special order of the Court. And it is said in *Turner's Case* (b);
 (b) St. Tr. 995. that the Court cannot grant the prisoner any precept to bring in his witnesses, &c.

Sec. 171. But by 7. Will. 3. c. 3. s. 7. "All persons accused and indicted for any *high treason*, whereby any corruption of blood may ensue, shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them at any such trial or trials; as is usually granted to compel witnesses to appear against them."

Sec. 172. And it seems, that since the statute of 1. Ann. c. 9. set forth more at large in the precedent section, which ordains, "That the witnesses for the prisoner shall be sworn," process may be taken out against them of course in any case whatsoever (c).

(c) The compulsory process to bring in witnesses in criminal causes is either by *subpoena* issued in the king's name by the justices where the plea of *not guilty* is to be tried, or the justices or coroner, who take the examination of the person accused; and the information of the witnesses may at that time (and this is the usual way), or at any time after, and before the trial, bind over the witnesses to appear at the sessions, and if they refuse to be bound over, may commit them for contempt. 2. Hale 52. 282. and also, if they neglect to appear when bound over, they shall forfeit their recognizance. 1. Burn's Justice 533. Where a witness is a prisoner in execution for debt, he must be brought up by *habeas corpus ad testificandum*, to give his evidence. 2. State Trials 580.
 4. State Trials 37.

AS TO THE EIGHTEENTH POINT, *viz.* In what cases witnesses may be allowed their expences.

Sec. 173. It seems, that in civil proceedings a witness is not obliged to attend, unless his expences are tendered to him pursuant to 5. Eliz. c. 9. and if after such tender he neglect to appear, he may be fined according to the directions of that statute, or punished by *attachment* for a contempt of the Court, as the circumstances of the case shall appear to be. (d) But in criminal proceedings the demands of public justice supersede every consideration of private inconvenience; and witnesses are bound, unconditionally, to attend the trial upon which they may be summoned, and be bound over to give their evidence. To persons of opulence and public spirit this obligation cannot be either hard or injurious; but indigent witnesses grew weary of expensive attendance, and frequently bore their own charges to their great hindrance and loss; and *Sir Matthew Hale* (e) complains of the want of power in judges to allow witnesses their charges, as a great defect in this part of judicial administration.

(d) *Ld. Ray.*
 1529.
Strange 1054.
 2250. 510.
Black. 36.
B. R. H. 313.

(e) 2. *Hale*
 282.

† *Seet.* 174. And it is recited by 25. Geo. 2. c. 36. Indigent prosecutors to be allowed their expences.
 “ That many persons are deterred from prosecuting persons guilty of felony upon account of the expence attending such prosecution;” whereupon it is enacted, “ That the Court before whom any person has been tried and convicted of any grand or petit larceny or other felony, at the prayer of the prosecutor, and in consideration of his circumstances, may order the treasurer of the county in which the offence shall have been committed, to pay such prosecutor such sum as the said Court shall think reasonable, not exceeding the expences he shall appear to have been put to in carrying on such prosecution, making him a reasonable allowance for his time and trouble therein; which order the clerk of assize, or clerk of the peace respectively, is hereby required forthwith to make out and to deliver unto such prosecutor, on being paid one shilling and no more; which order the treasurer shall forthwith pay to the prosecutor or his assigns.”

† *Seet.* 175. But the foregoing statute having only removed the inconvenience as to prosecutors, it is further enacted by 27. Geo. 2. c. 3. sect. 3. “ That when any poor person shall appear on recognizance in any court to give evidence against another accused of felony; the Court, at the prayer, and on the oath of such person, and on consideration of his circumstances, in open court, may order the treasurer of the county or place where the offence was committed, to pay what sum to the Court shall seem reasonable for his time, trouble, and expence; which order the proper officer of such court shall make out and deliver to such person, upon being paid six-pence; which order the treasurer shall pay as aforesaid”—except by par. 4. within the county of *Middlesex* (a), where the same (a) 1. Burn’s Justice 530. shall be paid by the overseers of the poor where the person was apprehended. has adopted this provision
 as the meaning of the act; but it certainly is not so expressed in Ruffhead’s Collection,

† *Seet.* 176. And as this last recited act extends only to poor persons appearing on recognizance; and the 25. Geo. 2. c. 36. before mentioned, gives relief only where the offender is convicted; it is further enacted by 18. Geo. 3. c. 19. “ That the Court before whom any person has been tried and convicted, or tried and acquitted of felony, in case it shall appear that there was a reasonable ground for the prosecution, and that the said prosecutor hath *bona fide* prosecuted, may order, upon the prayer of the said prosecutor, the treasurer of the county, riding, or division, in which the offence shall have been, or have been supposed to have been, committed, to pay such prosecutor such sum

“sum of money as to the said Court shall seem reasonable,
 “not exceeding the expences which it shall appear he has
 “been *bona fide* put to, in carrying on such prosecution,
 “making; in case the prosecutor shall appear to be in poor
 “circumstances, a reasonable allowance for his trouble
 “and loss of time; which order the clerk shall deliver on
 “receiving one shilling, and the treasurer shall pay as
 “aforesaid.”

† *Sect.* 177. And by 18. Geo. 3. c. 19. s. 8. “The
 “Court where any person shall appear on recognizance
 “or subpoena to give evidence as to any felony, whether
 “any bill of indictment be preferred or not to any grand
 “jury, provided the said person shall in the opinion of the
 “Court, *bona fide* have attended the said Court in obedience
 “to such recognizance or subpoena, may order the treasurer
 “to pay what to the said Court it shall appear the said per-
 “son was *bona fide* put to, by reason of the said recognizance
 “or subpoena, making, in case he is in poor circumstances,
 “a reasonable allowance for his trouble and loss of time;
 “for which order the clerk shall receive six-pence, and the
 “treasurer shall pay as aforesaid.”

† *Sect.* 178. And by 18. Geo. 3. c. 19. s. 9. “The quarter session
 “may alter or lay down such rules and regulations concerning
 “any costs and charges to be allowed to any person by vir-
 “tue of this act as to them shall seem just; which rules
 “and regulations having received the approbation and sig-
 “nature of one or more of the judges of assize, shall be
 “binding on all parties whatsoever; and no person shall be
 “allowed a greater sum than according to the said rules so
 “approved of, &c.”

As to THE NINETEENTH POINT, *viz.* What evidence
 maintains an indictment.

(a) Ch. 25.
sect. 115.
 Ch. 30. *sect.* 9.

Having already shewn, (a) that, according to the later
 opinions, where one is indicted upon a statute, and the
 evidence doth not bring the case within the statute, but yet
 proves the offence in the indictment as it is an offence at
 the common law, the defendant may be found guilty at the
 common law, and the words *contra formam statuti* rejected as
 surplus.

(b) Ch. 35.
sect. 11.

Having also shewn, (b) that it is strongly holden, that a
 man cannot be found guilty of an indictment against him
 as principal, upon evidence which only proves him to have
 been accessory before, but shall be discharged of the indict-
 ment;

I shall

I shall in this place take notice only of the following particulars:

Sett. 179. FIRST, That it is a settled rule (a) in all cases, whether capital or not capital, that the day laid in the indictment or (b) appeal is not material upon evidence; but that the defendant may be convicted upon proof of a fact at any other time, whether before or after the day laid; so (c) that it were before the time when the indictment or appeal were preferred: and agreeably hereto Sir (d) Henry Vane was found guilty of an indictment of high treason laid on the thirtieth of May, in the eleventh of Charles the second, upon evidence of a fact done the thirtieth of January, in the first year of Charles the second.

(a) Sum. 264.
1. Hale 361.
2. Hale 179.
291.
3. Inst. 230.
1. Salk. 283.
Kelynge 16.
2. Inst. 318.
319.
4. State Trials 9.
(b) Sum. 187.
(c) 1. Salk. 283.
(d) Sum. 264. 2. Inst. 318. 3. Inst. 230.
Confirmed by all the judges in the case of Lord Baltimore, 9. State Trials 587. and Townley's Case, Foster 7, 8.

Sett. 180. SECONDLY, That where the time proved varies from that laid in the indictment or appeal, the jury may either find the defendant guilty generally, in which case the forfeiture shall relate to the time laid, till the verdict be falsified by the party interested (as it may be in this (e) respect, though not as to the point of the offence); or they may (f) specially find him guilty on the day on which the fact is proved, whether before or after the day laid in the indictment or appeal, in which case the forfeiture shall relate to the day so specially found. But where a verdict expressly finds a defendant guilty before the time laid in the indictment or appeal, whether it may be falsified, as to the time, by the party interested, as it may be where it finds him guilty generally of the offence in the indictment or appeal, upon evidence of a fact after the time laid, may deserve to be considered.

Sett. 181. THIRDLY, That where a certain (g) place is made part of the description of the fact which is charged against the defendant, the least variance as to such place between the evidence and indictment is fatal; as where a trespass in taking away goods, or any other offence is alledged in such a parish in the house of J. S. or in such a parish in a play-house in Lincoln's-inn-fields, and upon evidence it appears to have been done at the house of a different person, or that there is no play-house in Lincoln's-inn-fields.

Sett. 182. But it is a settled (h) rule, that a place laid only for a venue in an indictment or appeal is no way material upon evidence; but that a proof of the same crime at

(a) 2. Hale any other place in the (a) same county, maintains the indictment or appeal as well as if it had been proved in the very same place.
291.
See the books above cited, and *supra* ch. 25. sect. 35 to 54. and Cro. Eliz. 911.

(b) Kelynge 33. *Sett.* 183.^o Also it hath been (b) adjudged, that after a crime hath been proved in the county in which it is laid, evidence may be given of other instances of the same crime in another county, in order to satisfy the jury.
and Lord Preston's Case, 4. St. Tr. 410. confirmed by Lord Mansfield in *Henfey's Case*, 1. Burrow 650.

(c) Kelynge 14. 15. *Sett.* 184. Also it was (c) adjudged, in *Sir Henry Vane's Case*, that where one is indicted for high treason in compassing the king's death in *one county*, and the levying of war in the same county is laid as an overt-act of such treason,

(d) For it is necessary that some overt-act be proved in the same county, for otherwise the compassing could no way be said to be proved in the county wherein it is laid. See the books above cited. (e) Kelynge 15. and *Deacon's Case*, 9. State Trials 558. Foster 9.

Sett. 185. Also it seems, that *at this day* the levying of war can in no case be given in evidence as an overt-act in any county in which it is not laid, unless it tend to prove some overt-act that is expressly laid; for it is enacted by

(f) *Fost.* 245. 7. Will. 3. c. 3. s. 8. "That no (f) evidence shall be admitted or given of any overt-act that is not expressly laid in the indictment against any person or persons whatsoever."

(g) Captain Vaughan's Case, 5. State Tr. p. 17 to 38. *Sett.* 186. In the construction whereof it hath been (g) adjudged, that where one is indicted for high treason in adhering to the king's enemies, and certain acts of hostility done by him in a certain ship called *the Glencarty*, are laid as the overt-acts of such adherence, no evidence can be given of any other distinct act of adherence, having no relation to, nor any way tending to prove, what was done in *the Glencarty*, though it conduce to prove the same species of treason; and therefore that on such an indictment no evidence can be given of the prisoner's having run away to the enemy in a custom-house-boat, &c.

(b) Rookwood's Case, 4. State Tr. 661 to 697. *Sett.* 187. But it hath been (b) adjudged, that where one is indicted for high treason in compassing the king's death, and a consult and agreement to assassinate the king is laid as one of the overt-acts of such treason, the defendant's giving about

about among the conspirators a list of the persons names who were intended to be employed in the assassination, may be given in evidence against him upon such indictment, because it naturally tends to prove his agreement to the intended assassination, which agreement is one of the overt-acts laid in the indictment.

Self. 188. Also it hath been (a) adjudged, that where the writing of several treasonable letters is laid as an overt-act of high treason in compassing the king's death, and the purpose of such letters is only set forth in the indictment without a particular recital or description of any of them, the particular letters making good such charge may be read at the trial.

(a) Francia's Case, 6. State Trials 58 to 102. Yet in some indictments the very words charged to have been treasonable have been set forth. 2. St. Tr. 746. 219.

Self. 189. FOURTHLY, That where several overt-acts are laid in an indictment of high treason, the proof of any (b) of them maintains the indictment as much as if every one of them were proved.

(b) Lowick's Case, 4. State Trials 718. and Loyer's Case, 6. State Trials 216. 1. Hale 122. Foster 194.

Self. 190. FIFTHLY, That where one is indicted for writing a (c) libel *secundum tenorem sequentem*, or for forging a deed so and so described, any the least variance between the libel recited, or deed described, and those given in evidence, is fatal; but that where the *substance* only of a libel is set forth, it is sufficient if the libel be proved to have the same sense as is set forth (†).

(†) The word "*as follows*" implies, and binds the party to an exact recital, Dougl. 97. So also the words "*as follows, that is to say*," are altogether as certain as if it had been said, "*in the words and figures following, that is to say*," Powell's Case, 2. Bl. Rep. 788. But the words "*in manner and form following, that is to say*," do not bind the party to recite the instrument *verbatim*, nor render mere formal omissions or mistakes fatal, May's Case, Douglas 193. In perjury, on an affidavit recited to the "*tenor and effect, &c.*" where "*undertood*" was inserted in the indictment instead of "*understood*," the variance was held not fatal, Reach's Case, Cowper 220. So also in forgery, where the bill given in evidence was "*value received*," and the recital in the indictment was "*value received*," the variance was determined by all the judges to be immaterial; for it is impossible to mistake it, Hart's Case, Cases Cro. Law 131. The true distinction is said by LORD MANSFIELD to be, that where the omission or addition of a letter does not change the word so as to make it *another word*, the variance is not material; but that where the mis-recited word is in itself *a word*, not intelligible with the context, there the variance is fatal. Salk. 660. Cowp. 230. Douglas 194. note 23. But by POWERS, if the Court once give into solutions of variances, they will never know where to stop, and being once at sea will find it difficult to reach the harbour again. 2. Str. 231, 232.

Self. 191. Yet it seems (d) agreed, that it is no evidence (d) Hobart in any criminal case, that the defendant said so and so, or words to the like effect; because the Court must know the very words, to judge of their force and effect.

SECT. 192. SIXTHLY, That a variance between an indictment or appeal of death, and the evidence, as to the instrumental cause mentioned in such indictment or appeal, is no (*a*) way material, so that the party be proved to have died by the same kind of death as is alledged in the indictment or appeal.

(*a*) 9. Coke 67.

2. Hale 105.

291. 185.

2. Inst. 319.

3. Inst. 135. 50. Summary 265. Gilb. 270. 277.

(*b*) See the books above cited, and *sup* c. 23. f. 84.

SECT. 193. And therefore it is (*b*) agreed, that if one be indicted or appealed for killing another with a sword, and upon evidence it appear that he killed him with a staff, hatchet, bill, or hook, or any other weapon with which a wound may be given, he ought to be found guilty, for the substance of the matter is whether he gave the party a wound of which he died; and it is not material with what weapon he gave it, though, for form's sake, it be (*c*) necessary to set forth a particular weapon. And on the same ground it hath been also (*d*) adjudged, that an indictment or appeal for poisoning a man with one kind of poison, may be maintained by evidence of a different kind of poison; for the substance of the matter is, whether the defendant did poison the deceased, or not. (*e*) Yet it seems clear, that evidence of poisoning, burning, or famishing, or any other kind of killing wherein no weapon is used, will not maintain an indictment or appeal of death by killing with a weapon; and that evidence of killing with a weapon will not maintain an indictment or appeal of poisoning, &c. because they are different kinds of deaths; and in like manner that an indictment of treason could (*f*) never be maintained by evidence of treason of a different species.

(*c*) *Vide sup.* c. 23. f. 84.

(*d*) 3. Inst. 135.

Summary 265.

3. Inst. 319.

(*e*) 2. Hale 291.

2. Inst. 319.

1. State Trials

p. 118. Over-

bury's Case.

(*f*) 4. State Tr. 9.

2. Hale 291.

Mackally's

Case,

9. Coke 67.

(*g*) Sum. 265.

2. Hale 292.

3. Inst. 165.

SECT. 194. SEVENTHLY, That it seems a (*g*) general rule, that wherever a variance between an indictment or appeal, and the evidence brought to support them, is material or immaterial in respect of the principal; in the same cases also it will be material or immaterial in respect of the accessory.

(*b*) But there were anciently some opinions to the contrary, *sup.* c. 29. *sect.* 7. and *Gilb. L. E.* 271.

2. Hale 185.

292. 344. 345.

5. P. C. 41.

9. Coke 67.

1. Hale 437. 438.

2. Summ 292.

Sup. c. 23. *sect.* 76.

c. 25. *sect.* 64.

(*k*) See the book above cited, and B. 1. c. 32. *sect.* 6. ch. 31. *sect.* 31. and 50. ch. 34. *sect.* 7. ch. 38. *sect.* 8, 9. ch. 41. *sect.* 6. Douglas 210.

SECT. 195. EIGHTHLY, That it is (*b*) settled at this (*i*) day, that if an indictment or appeal against *A. B.* and *C.* for the death of *D.* charge *A.* as having given the mortal blow, and *B.* and *C.* as having been present, procuring and abetting, and the evidence prove that *B.* and *C.* gave the blow, and that *A.* was only present, procuring and abetting, yet it maintains the indictment; because in such a case, in the (*k*) judgment of law, the act of any of them is the act of all.

(*i*) *Plowden* 98. 100. 1. *Salkeld* 334. 335. *Wallis's Case.* 3. *Mod.* 121. 1. *Coke* 67. 4. *H.* 7. 18. *Ab. F. Corone* 60. *B. Appeal* 85. *Corone* 140. *S. P. C.* 41. 1. *Hale* 437. 438. 2. *Summ* 292. *Sup.* c. 23. *sect.* 76. c. 25. *sect.* 64. (*k*) See the book above cited, and B. 1. c. 32. *sect.* 6. ch. 31. *sect.* 31. and 50. ch. 34. *sect.* 7. ch. 38. *sect.* 8, 9. ch. 41. *sect.* 6. Douglas 210.

Sett. 196. NINTHLY, That it hath (a) been resolved, that if one be indicted as accessary to two, and upon evidence appear to have been accessary to one of them only, yet he shall be found guilty. But it is holden by Sir Edward Coke (b), that if an appeal be brought against two as principals, and against another as accessary to them, and one of those charged as principals be found not guilty, the accessary is discharged; for which he gives this reason, that because the plaintiff made him accessary to two, he cannot be found accessary to one: but no authority is cited for the maintenance of this opinion; neither doth it seem easy to reconcile it with the resolution above-mentioned, unless the rules of evidence on an appeal differ from those on an indictment, which I do not (c) find that they do as to other variances.

(a) Sancher's Case,
9. Coke 119.
2. Hale 292.
Vide Keilw.
107. and sup.
c. 29. f. 46, 47.
(b) 2. Inst.
183.

(c) Vide sup.
f. 32. 34. 37.
38, 39.

Sett. 197. TENTHLY, That it hath been (d) agreed, that if a person be generally indicted for the murder of another *ex malitiâ præcogitatâ*, and no express malice appear upon the evidence, but only (e) malice implied by law, yet he shall be found guilty.

(d) 9. Coke 67.
C. Jac. 280.

(e) See B. 1.
c. 31. f. 18, 19.
and f. 40 to 43.

Sett. 198. Also it hath been (f) adjudged, that where an indictment sets forth all the special matter in respect whereof the law implies malice, a variance between the indictment and evidence as to the circumstances doth no hurt, so that the substance of the matter be found: as (g) where an indictment for the murder of a serjeant at mace in London upon an arrest, supposes that the sheriff made a precept to such serjeant for the arrest, and upon the evidence it appears that there was not any such precept, but that the serjeant made the arrest *ex officio* at the plaintiff's request upon the entry of the plaint, according to the custom of the city; for the substance of the matter is, whether the defendant killed an officer in the lawful execution of legal process.

(f) 9. Coke 67.

(g) 9. Coke 62.
Vide the case
of Rex v. Baker, Cases
Cro. Law 106.

Sett. 199. ELEVENTHLY, That violent (h) presumption from plain circumstances is in some cases taken for full proof; as where a man is stabbed in a house, and another runs out with a bloody knife in his hand, and no one else is in the house at the time. Also it is (i) said, that a probable presumption is of some weight, but that a light one is not to be regarded at all.

(h) Co. Litt. 6.
S. P. C. 179.
Vide sup. c.
45. f. 10. and
1. St. Tr. 181
636.
2. St. Tr. 406.
3. St. Tr. 128
229. 688 689.

894. 901. 928, 929, 930. (i) Coke on Littleton 6. Comm. 367. 4. Comm. 333.

Sett. 200. TWELFTHLY, That it is enacted by 21. Jac. c. 27. "That if any woman be delivered of any issue of her body, male or female, which being born alive should by the laws of this realm be a bastard, and that she endeavour

“ privately, either by drowning, or secret burying thereof,
 “ or any other way, either by herself or the procuring of
 “ others, so to conceal the death thereof, as it may not
 “ come to light, whether it were born alive or not, but be
 “ concealed; in every such case, the said mother so offend-
 “ ing shall suffer death as in case of murder, except such
 “ mother can make proof by one witness at the least, that
 “ the child whose death was by her so intended to be con-
 “ cealed was born dead.”

(a) Kely. 31. *Sett.* 201. In the construction whereof it hath been (a) adjudged, that in order to convict a woman by force of this statute, there is no need that the indictment be drawn specially, or conclude *contra formam statuti*; but that it is the better way to set forth only that the defendant *infantem masculum vivum parturit, qui quidem infans masculus adtunc et ibidem vivus existens natus per legem hujus Angliæ spurius fuit*, ANGLICE “ a bastard;” and then go on in the ordinary way to shew that she murdered him, &c. *contra pacem*, &c. for the statute doth not make a new offence, but only makes such concealment an undeniable evidence of murder.

(b) Kely. 32. *Sett.* 202. Also it hath been (b) agreed, that where a woman appears to have endeavoured to conceal the death of such child within the statute, there is no need of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it shall be undeniably taken that the child was born alive, and murdered by the mother.

(c) Kely. 32. But it hath been (c) adjudged, that where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she was not within the statute, because she knocked for help.

(d) Kely. 33. Also it hath been (d) agreed, that if a woman confesses herself with child before-hand, and afterwards be surprised and delivered, nobody being with her, she is not within the statute, because there was no intent of concealment. And therefore in such cases it must appear by signs of hurt upon the body, or some other way (e), that the child was born alive.

(e) 4. Comm.
396. 358.

As to THE TWENTIETH POINT, viz. What may be given in evidence on the part of the defendant.

Sett. 203. It seems (f) agreed, that *son assault demesne* may be given in evidence on the general issue in an indictment, but not in an action of battery.

(f) Savil 32. *Sett.* 204. Also it seems to have been always (g) agreed, that the defendant in an information on a penal statute may give in evidence any exception in his favour in the body of the

the act. And it hath also been (a) holden, that he may give (a) 1. R. Abr. in evidence any such exception in a *proviso* of the act (be- 683. cause any such exception shews that he did not act against the form of the statute); but that he cannot (b) give in evidence any clause of exemption in a latter statute, but ought to plead it. 32. B. Gen. Issue

3. Vide sup. c. 15. f. 113. (b) 2. R. Abr. 683.

† As to THE TWENTY-FIRST POINT, *viz.* In what cases *character* may be given in evidence.

† *Sec.* 205. If the defendant's character is put in issue Bull. N. P. by the prosecution, the prosecutor may examine to particular 296. facts; for it is impossible without it to prove his charge; but in the particular case of an indictment for barratry, this cannot be done without giving notice to the defendant what particular facts are to be given in evidence.

† *Sec.* 206. But, except in these instances, the prosecutor Bull. N. P. cannot enter into the defendant's character, unless the de- 296. fendant enable him to do so, by his calling witnesses to support it, and even then the prosecutor cannot examine to particular facts.

† *Sec.* 207. The character of a witness also can only be Bull. N. P. impeached by examinations into general character, and not 296. to particular facts.

† *Sec.* 208. It is also decided, that a party shall never Determined in be permitted to bring general evidence to discredit his own Hastings's witness, for that would enable him to destroy the witness if Trial in he spoke against him, and to make him a good witness if House of Lords, 11th he spoke for him, with the means in his hands of destroying June 1789. his credit, if he spoke against him.

† *Sec.* 209. But if a witness prove facts in a cause Bull. N. P. which make against the party who called him, yet the party 297. may call other witnesses to prove that these facts were otherwise.

As to THE TWENTY-SECOND POINT, *viz.* Whether a bill of exceptions lies to evidence in criminal cases.

Sec. 210. It hath been adjudged, that no bill of ex- Sir Henry ceptions is grantable on an indictment of treason or felony; wherein it is Vane's Case, said, that such bill never was nor ought to be allowed in any capital case, 2 St. Tr. Harg. Edit. 450. And as this case is reported in 1. Sid. 85. 1. Keb. 384. it seems to have been holden, that it is not grantable on any indictment; and as it is reported in 2. Lev. 68. and Kely. 15. that it is not grantable in any criminal case whatsoever. Vide 2. Inst. 427. and the Rigers Case, 1. Vern. 175.

the

the statute of *Westminster the second*, 13. Edw. 1. ft. 1. c. 2. c. 31. *cum aliquis implacitatur coram aliquibus justiciariis proponat exceptionem, &c.* having never been thought to extend to any such case, it being plain that it could not but cause an infinite delay of justice if it should.

Rex v. Preston on the Hill, **Burr. S.C. 77.** † *Señ. 211.* It hath also been determined, that a bill of exceptions will not lie to the court of quarter-sessions, upon an appeal against an order of removal; for that it must be such a proceeding as in construction of law is an *impleading* of the party.

CHAPTER THE FORTY-SEVENTH.

O F

V E R D I C T.

FOR the general learning of verdicts I shall refer to other books, and in this place take notice only of the following particulars.

Sect. 1. **FIRST**, That it seems to have been (*a*) anciently an uncontroverted rule, and hath been allowed, even by those (*b*). of the contrary opinion, to have been the general tradition of the law, that a jury sworn and charged in a capital (*c*) case, cannot be discharged (without the (*d*) prisoner's consent) till they have given a verdict. And notwithstanding some (*e*) authorities to the contrary in the reign of king *Charles the second*, this hath been holden for clear law both in the reign of king (*f*) *James the second*, and (*g*) since the Revolution.

(*a*) Co. Litt. 227.
 (b) 3. Institute 120.
 1. Ander. 103.
 104.
 2. Hale 294.
 2. State Tr. 827.
 1. Anderson 103.
 (b) Raym. 84.
 (c) And the same is holden by Coke as to larceny, and any case of member, 3. Institute 110. Co. Litt. 227. b. But as to cases of an inferior nature, the contrary hath been adjudged, Raymond 84. Vide 1. Ventris 69. (*d*) 1. Anderson 103, 104. Foster 36. (*e*) Kelynge 47. 26. 52. Comberbach 401. 1. State Trials 978. 2. State Trials 155. 277. 389. Raymond 84. (*f*) 3. St. Trials 678. Vide sup. c. 44. f. 22. (*g*) 4. St. Trials 110. 178, 179. Sed vide Rookwood's Case, 4. State Trials 649. and this was confirmed by the declaration of LORD MANSFIELD at the trial of Lord George Gordon for high treason. Vide also 4. Comm. 354. But see this point argued at large, Foster 29 to 39. where in certain cases there may be an exception to this general rule.

Sect. 2. **SECONDLY**, That it seems to have been (*b*) (*b*) Co. Lit. always agreed, that in all (*i*) capital cases the jury must give their verdict openly in court, and cannot give a privy verdict.
 3. Inst. 110.
 Raym. 193.
 1. Hale 300.
 4. Comm. 354. 1. Hale 598. 2. Hale 309. (*i*) The same is holden by Sir Edward Coke as to larceny, and any case of member, 3. Inst. 110. Coke Lit. 227. And it is said in Raymond 193. that no privy verdict can be given in any case where the jury are to look upon the prisoner when they give it.

Sect. 3. **THIRDLY**, That it is settled, (*k*) that the jury (*k*) S. F. C may give a special verdict in any criminal case, whether capital or not capital, as well as in a civil.
 165.
 2. Hale 301.
 302.
 9. Coke 12. 63. 1. Bulstrode 87. Vide infra f. 6. But it is said, Kelynge 29, 30, that it is dishonourable for the Court to suffer a special verdict in a plain case.

Sect.

(a) C. Eliz.

276. 296. 464.

(b) Dyer 261.

4. Coke 43.

9. Coke 81.

Dalison 14.

Latch 126.

Plowden 101.

Cro. Eliz. 276.

290. 464.

Moor 407.

B. Coro. 121.

But 2. Roll.

461. this was

questioned as

to an appeal of

death.

(c) B. Corone

267.

2. Hale 302.

Dalison 14.

S. P. C. 165.

See the book

cited to the

following

section.

(d) 1. Bullst. 87.

It is holden by two judges against one, that where the appeal men-

tioned three wounds, and the verdict found but one, yet the variance was immaterial.

Vide c. 46. f. 37. and the case of Stephen Self, Cases C. L. 127. (e) See the books

cited supra lett. b. (f) 2. Hale 302. S. P. C. 15. 165. 3. Inst. 56. 26. H. 8. 5.

Aley 12. (g) F. Cor. 264. 286, 287. 305. Vide Benlowe 47. 1. Anderson 41.

(b) 43. Affize 31. F. Corone 226. Crompton 114. S. P. C. 165. Vide Benlowe

47. 1. Anderson 41.

(i) 1. Ander.

103, 104. And

note, that in

all the books

cited under

the fourth

section to let-

ter b, where

the defendant

is found guilty

of man-

slaughter on

an indictment

of murder, he is expressly acquitted of the murder; but other books

which speak of this matter, say in general that the defendant may be found guilty of

manslaughter on an indictment of murder, without saying any thing as to the necessity

of giving an express verdict upon the murder. 9. Coke 67. Crompton 114. 2. Hale

267. 2. Hale 302. See 4. Coke 40. 46. (h) F. Corone 284. 286, 287. See vide

44. E. 3. 44. F. Corone 98. Benlowe 47. 1. Anderson 41.

Sect. 4. FOURTHLY, That it hath been (a) adjudged, that where the jury find a man not guilty of an indictment or appeal of murder, they are not bound to make any inquiry, whether he be guilty of manslaughter, &c.; but that if they will they may, according to the nature of the evidence, find him guilty of (b) manslaughter or (c) homicide *se defendendo*, or *per infortunium*; for the killing is the substance, and the malice but a circumstance, a (d) variance as to which hurts not the verdict. Yet the books seem to make this difference, that where the jury find the defendant guilty of manslaughter on an indictment of murder, they may give their verdict (e) generally, without setting out any of the circumstances of the fact; but that they shall not (f) be received to find him guilty generally of homicide *se defendendo*, or *per infortunium*, but must set out the whole circumstances of the fact, and in the (g) conclusion shew of what crime they find the defendant guilty, wherein if they be mistaken, it is (b) said, that the Court may notwithstanding give such judgment as shall appear to be proper from the circumstances of the fact specially set forth.

(d) 1. Bullst. 87. It is holden by two judges against one, that where the appeal mentioned three wounds, and the verdict found but one, yet the variance was immaterial. Vide c. 46. f. 37. and the case of Stephen Self, Cases C. L. 127. (e) See the books cited supra lett. b. (f) 2. Hale 302. S. P. C. 15. 165. 3. Inst. 56. 26. H. 8. 5. Aley 12. (g) F. Cor. 264. 286, 287. 305. Vide Benlowe 47. 1. Anderson 41. (b) 43. Affize 31. F. Corone 226. Crompton 114. S. P. C. 165. Vide Benlowe 47. 1. Anderson 41.

Sect. 5. FIFTHLY, That it hath been (i) adjudged, that if the jury on an indictment or appeal of murder find the defendant guilty of manslaughter, without saying any thing expressly as to the murder, it is insufficient and void, as being only a verdict for part. And *quare* if the law be not the same where the jury upon such an indictment find that the defendant killed the deceased *se defendendo* or *per infortunium*, and do not expressly find that he did not murder him, according to the generality of the ancient (h) authorities. If on an indictment of murder, he is expressly acquitted of the murder; but other books which speak of this matter, say in general that the defendant may be found guilty of manslaughter on an indictment of murder, without saying any thing as to the necessity of giving an express verdict upon the murder. 9. Coke 67. Crompton 114. 2. Hale 267. 2. Hale 302. See 4. Coke 40. 46. (h) F. Corone 284. 286, 287. See vide 44. E. 3. 44. F. Corone 98. Benlowe 47. 1. Anderson 41.

Sect. 6. SIXTHLY, That it is agreed, that on an indictment for stealing goods of a certain value above 12d, the (i) jury may find the defendant guilty, but that the goods are but of the value of tenpence, &c.

(j) F. Corone

115. 177. 451.

18. Affize 14.

2. Hale 392. S. P. C. 165. Crompton 114. B. 1. c. 35. l. 4.

† SEVENTHLY, That on an indictment of robbery with putting in fear, the jury may find the prisoner guilty of the felony, but not guilty of the robbery.

† EIGHTHLY, That on an indictment on the 8. Eliz. c. 4. where it is *clam et secretè à personâ*, the jury may find the offender guilty of stealing, but not *privately* from the person.

† NINTHLY, That if a man be indicted on the statute of Harwood's stabbing, 1. Jac. 1. c. 8. and the indictment conclude *contra Case,*
formam statuti; yet the jury may acquit him upon the statute, 23. Charles
and find him guilty of manslaughter at common law. the first, Styles 86.

† TENTHLY, That on an indictment for petit treason *felonice et proditoriè*, the offender may be acquitted of the petit treason, and found guilty of the manslaughter or murder, as 2. Hale 184.
the circumstances of the case shall appear to be. See Radburn's Case, Cases C. L.

† ELEVENTHLY, On an indictment for burglary *quod felonice et burglariter fregit et intravit*, and certain goods *felonice et burglariter cepit et asportavit*, the offender may be acquitted of the burglary and found guilty of the felony.—But on the contrary, it seems that he cannot on such an indictment be acquitted of the felony and found guilty of the burglary; because though where the indictment comprizes burglary and felony the indictment is good, though it be not supposed in the indictment that it was *ea intentione ad bona furandum*, for the act of theft being charged at the same time it is a sufficient evidence of his intention; but when he is acquitted of the felony, there being nothing expressly charged in the indictment that *burglariter fregit, &c. ea intentione ad bona, &c. felonice furandum*, it stands single, as if the indictment had been of single burglary; in which case the clause of *ea intentione ad furandum, &c.* had been necessary to complete the single burglary. 1. Hale 560.
Vide the King v. Summers, Tri. Term 1706.
Rex v. Francis, Comyns 478.

Comer was indicted for burglary, "and that he one diamond necklace, &c. did feloniously and burglariously steal, &c." The verdict was "guilty of stealing in the dwelling-house. Not guilty of the burglary." On 30th. November 1744, all the judges agreed, that the *fact of felony* being laid to constitute the burglary, and not the *intention of felony*, vide 1. Hale 559, 560. the acquittal of the burglary included an acquittal of the *felony in the dwelling-house*, and that he was intitled to clergy on *this manner* of taking the verdict. But if the verdict had acquitted him of breaking and entering the house in the night-time, and found him guilty of the *rest of the indictment*, this finding would have included the offence of stealing goods in the dwelling-house, and then by 12. Ann. he would have been excluded from clergy. And in the King v. Withal and Overand at Guildford Assizes 1772 for burglary, the jury found a verdict "not guilty of breaking," but "guilty of stealing in the dwelling-house." It was objected that the prisoners could not be ousted of clergy by 12. Ann. because there was no separate count to support that charge. But all the judges were unanimous that the prisoners were ousted of clergy; for an indictment for burglary contains every charge that is necessary on the twelfth of Ann. MS.

† TWELFTH-

† TWELFTHLY, Upon the 10. & 11. Will. 3. c. 23. for stealing to the value of 5s. from a shop, &c. if the offence should appear to have been committed in such a place as the act was intended to protect, yet a jury may find a verdict for the larceny only, as under five shillings.

But it seems that if a man be indicted for felony generally, and upon the evidence it (a) plainly appear that the fact amounts to no more than a bare trespass, he cannot be found guilty of the trespass, but ought to be indicted anew. Yet if the special circumstances of the case be set forth in an indictment for an offence laid as felony, and the defendant be found guilty generally, and afterwards the Court be of opinion that the fact doth not amount to felony, but only to an enormous trespass, it seems (b) agreed, that judgment may be given as for a trespass only. Also, if the jury find a special verdict on a general indictment for felony, and the crime be adjudged upon such verdict to be but a trespass, (c) judgment may be given upon it as for a trespass only. Also, if on an indictment of trespass the fact appear to have been felonious, it hath been (d) adjudged, that the defendant may be found guilty of the indictment as it is laid, because the king may proceed against the offender as he thinks fit, either as a trespasser or felon. But the contrary is (e) said to have been holden by the late *chief justice* HOLT; and it hath been (f) adjudged, that if it appear in an action of trespass that the taking was felonious, no verdict ought to be taken unless the defendant have been before tried for felony, because the suffering such actions might be a means to prevent prosecutions for felonies.

(a) Kelynge 29, 30. C. Car. 332. It is made a *quare* 2. H. 7. 22. and 10. whether where an indictment of larceny is insufficient as to the felony, the party may be found guilty of the same taking as for a trespass. (b) Kelynge 29, 30. C. Car. 376, 377. 2. Jones 351. (c) C. Jac. 497, 498. See vide West-ber's case, Stra. 1133. where this is denied to be law. (d) 18. Edw. 4. 10. 2. Levinz 208. Vide sup. c. 35. f. 5. and t. 36. f. 6. that an acquittal or judgment against a man in an action or indictment of trespass is no bar on an indictment or appeal of larceny. Kelynge 30. (e) 6. Mod. 77. (f) 2. R. Abr. 556, 557. Noy 18. Vide 1. Jones 147. Noy 82. Latch 145. 1. Mod. 283. Cont. Bracton cited S. P. C. 28. 83.

Commonly it is a business of a court, for they usually say, persons unknown did it, for this I shall refer to chapter nine, section thirty-three.

SECT. 8. FOURTEENTHLY, That on an indictment for a riot against three or more, if a verdict acquit all but two, and find them guilty; or on an indictment for a conspiracy, if the verdict acquit all but one, and find him guilty, it is repugnant and (g) void as to the two found guilty in the

(g) Popham 102. 2. St. Tr. 60, 61. 4. St. Tr. 160, 161. In the Year-Book of 11. H. 4. 21. pl. 28. Verdict 28: it is agreed, that such a verdict is repugnant, and therefore the Court would not receive it, but sent the jury back again, whereupon they found both the defendants guilty.

first case, and as to the one found guilty in the second, unless the indictment charge them with having made such riot or conspiracy *simul cum aliis juratoribus ignotis*; for otherwise it appears that the defendants are found guilty of an offence whereof it is impossible that they should be guilty; for there can be no riot where there are no more persons than two, nor can there be a conspiracy where there is no partner. Yet it seems (a) agreed, that if twenty persons (a) 4. St. Tr. are indicted for a riot or conspiracy, and any three found 160, 161. guilty of the riot, or any two of the conspiracy, the verdict is good (1).

(1) It has been determined where only two are found guilty of riot, or only one found guilty of conspiracy, they having, in both cases, been *indicted with others*, that judgment shall be given against them, Strange 193.; even though the others who were indicted do not come in to trial. Strange 1227. 12. Mod. 262. So where six were indicted for a riot, and two of them died before trial; two were acquitted, and two only found guilty; yet judgment was given upon this verdict; for by Lord Mansfield, they must have been found guilty with one or both of those who had not been tried, or it could not have been a riot. Burrow 1262.

And (b) where several are indicted for treason or felony, (b) 4. St. Tr. 160, 161. or other crime, which may be as well done by one only as by more, a verdict (c) may find one of the defendants only (c) Yet it hath been holden, guilty, and acquit all the rest. And in like manner it seems (d) agreed, that a verdict on an information on a That on an indictment of penal statute against several persons jointly charged with the offence against the statute, may acquit some and find others guilty; because though the words of the information be joint, yet in judgment of law, each defendant is severally charged for his own offence. And in like manner (e) it seems, that the defendant in such information may be found guilty for a less time or degree than is laid, unless the offence consist in doing some entire thing, which must be precisely proved in the same manner as it is laid. find A. guilty of the burglary, & B. of the felony only.

1. Sid. 171. Vide 2. Hale 293. (d) Vide sup. c. 26. f. 75. (e) Vide sup. c. 26. f. 75. 4. St. Tr. 160, 161.

SECT. 9. FIFTEENTHLY, That the Court in judging upon a special verdict is confined to the facts expressly found, and cannot supply the want thereof, as to any material part, by any argument or implication from what is expressly found (2); and therefore where an indictment set forth

(2) If the verdict do not sufficiently ascertain the fact, a *venire facias de novo* ought to issue, Skin. 669. Ld. Raym. 1517. for a special verdict cannot be amended in capital cases, per Lord Holt. Ld. Raymond. 141. Yet in the case of Sarah Hazel, Lord Mansfield said it might if there were minutes to amend it by, MS. Easter 24. Geo. 3. and in forgery a special verdict was amended because the fault was committed by the defendant, Strange 844. If a special verdict find only part of the matter in issue, or don't take in the whole issue, or if the imperfection be such that judgment cannot be given, it is bad. Ld. Raym. 1522. Off. Jac. 322. But if there be several issues, and the jury find only some of them, the Court may give judgment, Str. 845; for in a general verdict upon several counts, if any one of them is good, it is sufficient in criminal cases. Salk. 384. Doug. 730.

that

(a) Vide *Rex v. Messenger and others*, Kely. 72. *Rex v. Plummer*, Kely. 111. *Rex v. Royce*, 4 Burr. 2073. *Rex v. Francis*, Str. 1015. that the defendant discharged a gun against J. S. and thereby gave him a mortal wound, &c. and the special verdict found that he discharged a gun and thereby killed J. S. but did not expressly say that he discharged it against J. S. it was (a) adjudged, that the Court could not take it from the other circumstances of the fact, which were expressly found, though they were as full to the purpose as possibly they could well be, that the defendant discharged the gun against J. S. Comy. 748. *Rex v. Borthwick*, Doug. 207. *Rex v. Phillips*, Cowp. 830. for the precision with which special verdicts must find the necessary facts.—N. B. On a special verdict for murder the Court are judges of the malice. *Ld. Raym.* 1485. Str. 766.

(b) *Saunders* 108. *SECT. 10. SIXTEENTHLY*, That it hath been (b) adjudged,

that where an indictment found at the assizes is removed into the king's bench by *certiorari*, and there the defendant pleads not guilty, *et de hoc ponit se super patriam*, et T. F. miles coronator et attornatus dom' regis, &c. similiter, and thereupon the defendant is found guilty of the offence in

(c) See B. 1. c. 30. f. 9. What is a good verdict on an indictment of forgery, B. 1. c. 70. f. 27. *indictamento prædict' interius ei imposuit prout prædict' T. F. interius versus eum queritur*, the verdict is good; for these words *prout prædict' T. F. interius versus eum queritur* shall be rejected as surplus, (c) repugnant and void, and the verdict is complete without them.

(d) 1. *Ander.* 104.

Crompt. 114.

Aleyn 12.

2. *St. Tr.* 2.

60.

(e) *Crompt.* 14.

F. Coro. 108.

2. *Hale* 299.

310.

Foster 30.

(f) *C. Car.* 192.

against the opinion of Croke and Berkely, and Cro. Jac. 507. Vide 2. *St. Tr.* 60, 611.

where the Court upon the acquittal of the defendants of the indictment against them for a riot, committed them for their contempt to the Court during the trial.

(g) Agreed in the case of the King v. Bennett, Hilary, 4 Geo. 1.

wherein it

was holden by six of the judges against six, that a new trial was not grantable upon an acquittal on an information in the nature of a *quo warranto*, because it founds in the criminality. 1. *Keble* 124. 2. *Keble* 403, 404. Whether it be grantable for a corrupt practice in obtaining a verdict, 1. *Levinz* 9, 10. 124. *Sid.* 153, 154. 1. *Keble* 546.

568. 500. 3. *Keble* 179. 409. *Show.* 336. That it is not grantable where the acquittal was occasioned by a slip in an indictment of perjury in varying from the original record, 2. *Keble* 409. See the case of *Norris v. Tyler*, Cowp. 37. (b) Adjudged 4. *Jones* 163. 3. *Keble* 525. 1. *Levinz* 9. But it is doubted, 1. *Keble* 124. 127. 3. *Mod.* 350. 1. *Sid.* 49, and the contrary is ruled 2. *Keble* 396. 403.

SECT. 12. However, it is settled, that the Court cannot set aside a verdict which (g) acquits a defendant of a prosecution properly criminal, as it seems that they may a verdict that (b) convicts him, for having been given contrary

to evidence, and the directions of the judge, or any verdict (a) See Coke
whatevgr for (a) mis-trial.

Supra c. 23. f. 92. and c. 36. f. 15. Vide 2. Hale 310. 4. Comm. 354. 1. Levinz 9.
T Jones 163. 10. St. Tr. 416. See Gibson's case, cited in the case of Addow v,
Hopkins, Doug. 377.

† *Sec. 13.* And whereas persons acquitted on their trials, How prisoners
or having no indictments found against them, are frequently shall be dis-
detained in prison by gaolers on account of their fees, it is charged on a
enacted by the 14. Geo. 3. c. 20. "That every prisoner verdict of ap-
" charged with any felony or other crime, or as an accef- ppetual.
" sary thereto, before any court holding criminal jurisdic-
" tion in *England* and *Wales*, against whom no bill of in-
" dictment shall be found by the grand jury, or who on
" trial shall be acquitted, or who shall be discharged by
" proclamation for want of prosecution, shall be imme-
" diately set at large in open court without the payment of
" any fee or sum of money to the sheriff, gaoler, or keeper
" of the gaol or prison from whence such prisoner shall be
" so discharged and set at liberty. And the treasurer of
" every county, &c. on receiving a certificate from the
" judge, &c. shall pay out of the county rate, a sum not
" exceeding 13s. and 4d. for every prisoner so discharged,
" to the sheriff, gaoler, or keeper as aforesaid."

CHAPTER THE FORTY-EIGHTH,

O F

J U D G M E N T,

HAVING shewn already what judgment is good on an information, or action *qui tam*; where it may be saved by an award of transportation; (a) and that judgment in high treason, not being for counterfeiting the coin or seal, &c. shall not be arrested for miswriting or misspelling, or false or improper *Latin*: Having also premised, that by the course of the court of king's bench, upon every conviction in that court, of a crime (b), capital or not (c) capital, whether by (d) verdict or confession, the party is to have four days to move in (e) arrest of judgment, if there be so many days remaining of the Term; and if not, (f) then the longest time that can be had in the Term: Having also premised, that on a conviction of homicide *se defendendo* or *per infortunium*, no (g) judgment at all is to be given, but the party let to mainprise in order to purchase his pardon:

Ch. 26. f. 76.
Ch. 25.
147.
Algernon Sidney's Case, 3. St. Trials 794.
Rofewell's Case, 3. St. Tr. 999.
Knightley's Case, 4. St. Tr. 777.
(c) 3. State Tr. 77.
(d) 4. St. Tr. 210.
(e) But in
Saund. 301, 302. chief justice Hale refused to hear any motion in arrest of judgment of a scandalous conspiracy; but in my own experience I never knew such a motion refused to be heard. (f) 4. St. Tr. 217. Yet in the Lord Grey's case, 7. St. Tr. 63. the Court would not give judgment on a conviction for a misdemeanor, because there were not four days left of the Term. (g) Summary 269. 2. Hale 395. B. 1. c. 29, 2. sect. 24. Sup. c. 37. sect. 2.

I shall further endeavour to shew the nature,

1. Of judgment by express sentence to the punishment proper for the crime.

2. Of judgments without any such sentence.

Of judgments by such express sentence in criminal cases there are two kinds.

1. Such as are fixed and stated, and always the same for the same species of crimes.

2. Such as are discretionary and variable according to the different circumstances of each case.

AND FIRST,—Of fixed and stated judgments.

(a) 1. St. Tr. 704. *Seft.* 2. As to which it seems (a) agreed, that the law makes no distinction between a peer and a commoner, or between a *common or ordinary case, and one attended with extraordinary circumstances; for which reason it was (b) adjudged in *Felton's Case*, who was convicted, by confession, of the murder of the *Duke of Buckingham*, that the Court could not order his hand to be (c) cut off, nor make it part of the sentence that his body should be hanged in chains, but that the body after execution being at the king's disposal might be hanged in chains, (d) or otherwise ordered, as the king should think fit.

(c) Agreed 3. Inst. 140. 12. Coke 71. that the Court cannot order the hand to be cut off in any case wherein it is not the stated judgment. See B. 1. c. 21. sect. 1 to 7. (d) Vide inf. c. 51. f. 12.

Of such fixed and stated judgments, the most remarkable are those for,

1. Judgment for treason.
2. Judgment for felony.
3. Judgment for *præmunire*.
4. Judgment for misprisions.

(f) 3. Inst. 219. 211. *Seft.* 3. FIRST, The settled (f) judgment at (f) this day against a man for high treason, not relating to the coin, seems to be, that "he shall be (g) carried back to the place from whence he came, and from thence be (h) drawn to the place of execution, and be there hanged by the (i) neck, and cut (k) down alive, and (f) in the time of *Will. Rufus* judgment was given against two convicted of high treason, that one should have his eyes put out, and the other *in crucem tollatur*. *Mad. Exchequer* fol. 6. (g) S. P. C. 182. But this clause is wholly omitted in Summary 268. and 3. Inst. 210. and in *Plowden* 387. it is thus expressed, *quod præd' R. D. duceretur per præfas' constabular' usque dictam turrin' London, et deinde, &c.* And in *Coke's Entries* 361. b. it is thus, *quod' præd' T. B. ducatur per præfas' Marefc. usque prisonam Mar' Marfc. Domini Regis, &c.* (b) S. P. C. 182. it is expressed, that he shall be drawn upon an hurdle: and *Plowden* 387. it is, that he shall be drawn through the middle of the city of London to the gallows at Tyburn: Also in *Coke's Entries* 361. and 3. Inst. 310. a particular place of execution is mentioned. (i) S. P. C. 182. and 3. Inst. 110. But *Plowden* 387. Co. Ent. 361. and Summary 268. it is only said *quod suspendatur* without adding *per collum*. (k) 3. Inst. 110. S. P. C. 182. *Plowden* 387. Co. Ent. 361. But this is omitted Summary 268.

"that

" that his (a) entrails be taken out and (b) burnt before (a) This clause is thus expressed 3. Inst. 210. 211. Plowden 387. Coke's Entries 361. *quod introitus sua extra venter* item suum capiantur, without mentioning the cutting off the privy members; and so is Summary 268. 2. Hale 397. and the later precedents. But S. P. C. 182 is expressed that they shall be cut off. (b) S. P. C. 102. But in Plowden 387. Coke's Entries 361. 3. Inst. 211. it is thus expressed, *ipsosque vivente comburantur*.—Vide also Skinner 442. Carthew 318. 349.

stem suum capiantur, without mentioning the cutting off the privy members; and so is Summary 268. 2. Hale 397. and the later precedents. But S. P. C. 182 is expressed that they shall be cut off. (b) S. P. C. 102. But in Plowden 387. Coke's Entries 361. 3. Inst. 211. it is thus expressed, *ipsosque vivente comburantur*.—Vide also Skinner 442. Carthew 318. 349.

Secl. 4. It hath been always agreed to be proper judgment against a man for high treason at common law, in counterfeiting the king's (c) coin or (d) seal, that he shall be drawn to the place of execution, and there hanged by the neck till he be dead. But there have been (e) great opinions, that the judgment against a man for clipping, and other offences against the coin, made treason by statute, shall be to be drawn, hanged and quartered, as for other high treasons; because it is a general (f) rule, that where a statute makes an offence treason or felony, it gives it the like incidents that belong to a treason or felony by the common law; yet inasmuch as high treason at common law in counterfeiting the coin had judgment only of drawing and hanging; and it is a reasonable construction, that the makers of the statutes, which made other offences concerning the coin high treason, intended to give such offences the like (g) incidents with high treasons against the coin at the common law, and not to make inferior offences of this kind subject to heavier punishment than the greater; it seems to be (h) settled at this day, that the judgment for such offences shall be the same as for counterfeiting the coin, &c. at the common law, i. e. of drawing and hanging without quartering.

Raymond 234. 1. Ventris 254.

Secl. 5. It hath been (i) long (k) agreed, that the judgment against a man for petit treason is the same with that for counterfeiting the coin, viz. that he shall be (l) drawn

suorum infidaverint. (k) 3. Inst. 211. 1. Hale 382. 2. Hale 399. S. P. C. 182. 19. H. 6. 47. Ab. F. Corone 7. B. Treason 8. 33. Assize 7. Ab. B. Treason 15. F. Corone 210. (l) See 21. E. 3. 17. Ab. F. Corone 447. B. Corone 38. where an approver becoming nonsuit, had judgment to be hanged only, and not drawn, though he stood indicted of petit treason. But the case is obscure both in the Reports and Abridgments.

to the place of execution, and there hanged by the neck till he be dead.

(a) Preface to the 6th Report.

3. Inst. 211.

S. P. C. 182.

F. Corone 383.

B. Treason 12.

SECT. 6. The judgment against a (a) woman, in all cases of treason, whether high or petit treason, is, that she shall be drawn to the place of execution, and there burnt.

23. Affize 2. Ab. Bro. Treas. 26. 12. Affize 30. Ab. B. Corone 74. F. Corone 170. 1. Rich. 3, 4. Ab. F. Corone 46.

† But by 30. Geo. 3. c. 48. “ The judgment to be given “ and awarded against any woman or women convicted “ of the crime of *high treason*, or of the crime of *petit treason*, or of abetting, procuring, or counselling any “ *petit treason*, shall be, that they shall be severally drawn “ to the place of execution, and be there hanged by the “ neck until she or they be severally dead—and liable to “ such further pains and penalties as are particularly specified “ with respect to persons convicted of wilful murder by “ the statute 25. Geo. 3. c. 57. But on judgment passed “ in pursuance of this act, they shall be liable to such “ and the like forfeitures and corruption of blood as they “ severally would have been, in case they had been severally attainted of the like crimes before the passing of this “ act.”

(b) 1. Rich. 3. 4. Ab. F. Cor. 46. (c) 3. Inst.

SECT. 7. SECONDLY, The judgment against a man or (b) woman for felony of death, hath always been the same (c) since the reign of *Henry the First*, viz. that he or she be (d) hanged by the (e) neck till (f) dead, which in THE ROLL (g) is shortly entered thus, “ *ius. per coll.* ”

53. (d) S. P. C. 182. 2. Hale 399. 3. Inst. 211. F. Corone 227. See the citations to the next letter. (e) The words *per collum* are omitted Coke's Entries 60. 352, 353. 355. 360. Rastal 42. 53. 55. (f) 3. Inst. 53. 211. Sum. 268. 6. E. 4. 4. But this is omitted 6. H. 4. 6. S. P. C. 182. Rastal's Entries 42. 53. 55. the precedents in Coke's Entries cited to letter e, come only under an &c. (g) S. P. C. 182. 4. Comm. 396. 5. Modern 22. For the judgment and proceedings in murder, vide 15. Geo. 2. c. 37. Post. ch. 51. sect. 10.

SECT. 8. For the judgment of *pain fort et dure* upon all offenders standing mute, I shall refer to chap. 30. sect. 16.

(b) Co. Lit. 429. It is agreed 30. E. 3. 11.

SECT. 9. THIRDLY, Judgment in *præmunire* at the suit of the (b) king against the defendant, being in

Ab. F. Judgm. 145. and in 8. H. 4. 6. 7. Ab. F. Forfeit. 13. B. Forfeit. 12. Præm. 6. 20. that such judgment shall not be given at the suit of the party, on 27. Edw. 3. 5. but in the two last citations it is holden, that the same judgment shall be given at the suit of the party, en 16. Rich. 2.

(a) prison, is, that he shall be out of the king's protection, and (a) 3. Inst. 218. that his lands and tenements, goods and chattels shall be forfeited to the king, and that his body shall remain in prison at the king's pleasure; but if the defendant be condemned upon his (b) default in not appearing, whether at the suit of the king or (c) party, the same judgment shall be given as to the being out of the king's protection, and the forfeiture; but instead of the clause, that the body shall remain in prison, there shall be an award of a *capiatur*. Supra B. 2. c. 19. sect. 74. 45. Co. Litt. 129. 170. (b) Vide B. 1. c. 19. sect. 14. Rastal 456. 467.

3. Inst. 125. 218. Dalton c. 90. (c) 8. H. 4. 6. Ab. F. Forfeit. 13. B. Forfeiture 12. Præm. 6. 20. 30. E. 11. Ab. F. Judg. 145. 44. E. 3. 7. Ab. Resp. 35. 39. E. 3. 37. Ab. F. Retu. de Vic. 61. Attorney 36. 8. H. 6. 3. Ab. B. Præm. 8. 20.

SECT. 10. FOURTHLY, The judgment against a man for misprision of high treason (a) is, that he shall be imprisoned during his life, and forfeit all his goods, and the profits of his lands during his life. (a) 1. Hale 374. 2. Hale 400. 3. Inst. 36. 218.

B. Treason 19. 25.

SECT. 11. The judgment against a man for drawing a sword on a judge, or striking any person in the presence of the king's higher courts, is, that he shall be imprisoned during life, and forfeit his goods, and the profits of (f) his lands during life, and that his (g) right hand shall be cut off at a certain place. (c) B. 1. c. 21. sect. 3 to 6. (f) Sum 132. 41. Aflize 25. Ab. B. Fines 11. Forfeit. 41. Restitut. 32.

Scire Facias 160. 2. R. Ab. 76. Judgment was given, that the lands should be seized into the king's hands, and the king answered of the profits; after which the king granted over the lands as forfeited, and then pardoned the offence; and the heir was restored upon a *scire facias*: by which it appears that the inheritance of the lands was not forfeited. (Vide sup c. 37. sect. 54.) But in 1. Keble 751. the judgment is, that the lands shall be forfeited during life; and Dalison 23. *quare* is made by what law the lands shall be forfeited any farther than during life; yet 3. Inst. 140. 215. and 39. Aflize 1. Ab. B. Contempt 9. F. Aflize 333. Dyer 188. F. Judgment 174. F. Corone 280. S. P. C. 38. Owen 120. C. Eliz. 405. Dalison 23. say in general, that the land shall be forfeited without adding for life; and 21. Edw. 3. 12. Ab. F. Forfeit. 21. that the offender shall be disinherited. (g) In this part of the judgment the books above cited generally agree.

SECT. 12. For the judgments for (b) striking in the king's palace, for (i) rescuing a prisoner from the superior courts, (k) for perjury, or (l) forgery on the statute, and for the villainous (m) judgment in conspiracy at the suit of the king, I shall refer to the citations in the margin. (b) B. 1. c. 21. sect. 1, 2. (i) B. 1. c. 21. sect. 5. (k) B. 1. c. 69. sect. 11. 12. (l) Bk. 1. c. 71. sect. 9.

c. 70. sect. 12. (m) Bk. 1. c. 71. sect. 9.

(a) Co. Ent.

356.

Rastal 47.

48.

(b) Coke's

Entries 358,

359.

Rast. 51. 56. 57.

(c) Co. Ent.

360.

Rastal 51.

(d) Rastal 49.

57.

(e) Rastal 43.

50. (f) S. P. C. 182.

Sec. 13. The entry of the judgment for a defendant upon an acquittal by verdict, or upon the plea of a pardon, is, *Idco confid' est quod præd' A. B. de (a) præmissis eat inde sine die*, or *eat sine die* omitting (b) *de præmissis*; or *de præditionibus prædictis eat inde (c) quietus*; or (d) thus, *quod sit inde quietus*; &c. *et quod ipse eat inde sine die*; and upon the plea of a release to an appeal, and in other cases of the like nature, it is, *Idco confid' est quod (e) præd' A. quoad sectam præd' B. in præmissis eat inde sine die*. And (f) Staundforde says, that upon the acquittal of one arraigned of treason or felony, the judgment is no other, but that the Court discharges the defendant paying his fees.

SECONDLY, As to judgments by express sentence, which are discretionary and variable according to different circumstances.

(g) 3. Inst.

218.

Bk. 1. c. 33.

sect. 36.

(h) 3. State

Trials 487,

488.

Hobart 62.

(i) Raym. 81.

1. Sider. 142.

278.

3. Leonard

170.

(k) C. Jac.

498.

2. R. Abi. 78.

H. 1.

1. Keble 849.

Noy 99. 103.

(l) 2. St. Tr.

272.

Raym. 376.

against a Judge for bribery, that he should be incapable of any office of judicature.

Vide 4. Comm. 371.

Sec. 14. I shall observe in general, that for crimes of an infamous nature, such as petit (e) larceny, (b) perjury, or (i) forgery at common law, gross (k) cheats, conspiracy not requiring a villainous judgment, keeping a bawdy-house, bribing (l) witnesses to stifle their evidence, and offences of the like nature against the first principles of natural justice and common honesty, it seems to be in great measure left to the prudence of the Court to inflict such corporal punishment, and also such fine and lien to the good behaviour for a (m) certain time (n), &c. as shall seem most proper and adequate to the offence, from the consideration of the baseness, enormity, and dangerous tendency of it; the malice, deliberation, and wilfulness, or the inconsideration, suddenness, and surprize with which it was committed; the age, quality, and degree of the offender; and all other circumstances which may any way aggravate or extenuate the guilt.

Sec. 15. And at this day by force of 5. Annæ, c. 6. and 4. Geo. 1. c. 11. and 6. Geo. 1. c. 23. &c. &c. set forth more at large, Title Transportation (o), the judges, upon a conviction for larceny, may in their discretion award the offender to the house of correction; and for that and other felonies within the benefit of clergy, instead of giving the usual sentence, &c. may direct that the offender be transported.

(d) 41 Hawk.

P. C. 297.

Sec. 16. But it (a) seems, that the Court cannot be authorised by any letters patents, but only by act of parliament, to inflict a punishment unknown to our laws, as of (b) banishment, &c.

(a) Dalif. 20.
(b) 1. Inst. 47.
201.
Co. Litt. 235.

Sec. 17. NOTE, That the Court may affeſs a fine, but cannot award any corporal punishment against a defendant, unless he be actually present in the court (c).

(c) Salk. 56.
400.
Skin. 684.

Sec. 18. NOTE ALSO, That where there are several defendants, a joint award of one fine against them all is (d) erroneous, for it ought to be several against each defendant; for otherwise one who hath paid his proportionable part might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another.

(d) 11. Co. 49.
1. Roll. 74.
Ch. 9. sec. 16.
1. Lev. 126.

Sec. 19. It hath been adjudged, (e) that where a man is to make fine and ransom, the ransom must be treble the fine at least. But *Sir Edward Coke* strongly argues (f), that fine and ransom are in legal understanding the same thing under different names, called a *fine*, because it makes an end of the business, and a *ransom*, because it redeems from imprisonment; for if they were different things, it would follow, that where the books say that a man shall make a fine and ransom, they must be taken to intend that he ought to pay two different sums, of which there is no precedent.

(e) Dyer 232.
(f) Co. Litt.
127.

Sec. 20. A fine is under the power of the Court, during the Term in which it is set, and (g) may be mitigated as shall be thought proper; but after the Term it admits of no alteration.

(g) 1. Inst.
260.
Adj. Raym.
376. & Cro.
Car. 251.

Of judgments without an express sentence to the punishment proper to the crime, there are two kinds:

1. Outlawry.

2. Abjuration.

Sec. 21. JUDGMENT of outlawry is (h) given by the (i) coroner at the fifth county-court upon the party's not ap-

(h) Finch 356.
Dyer 223.
B. Coro. 166.
3. Inst. 212.

(i) C. Jac. 531. 1. Burn. 639. If the judgment appear not by the return of the *exigent* to have been given by the coroner, it is erroneous, except in *London*, where the *MAYOR* by custom is coroner, and the judgment is given by the recorder. *Coke* Litt. 288. B. Utlagary 31. Dyer 317. 8. *Coke* 126. 21. H. 7. 33. *Cro* Eliz. 648.

pearing

(a) Reg. 2. appearing to *the exigent*; which is a (a) writ commanding the sheriff to cause the defendant to be demanded from the county-court to county-court until he be outlawed, &c.; and such judgment is (b) entered thus, "*Ideo, &c. per judicium coronatoris domini regis comitatus prædicti utlagatus est.*" Dr. Cameron, Foster 109. and Lord Griffin, Foster 113.

(c) Co. Litt. 228. 288. Sect. 22. It seems (c) agreed, that when a judgment of outlawry for treason or felony appears of record by the sheriff's return of *the exigent*, and it hath been (d) holden, that if it appear not by such return, but only by the coroner's return of a (e) *certiorari* to them directed to certify whether the party were outlawed or not, the party is as much (f) attainted, and shall forfeit and lose as much as if sentence had been given against him upon verdict or confession. 28. Affize 49. Ab. B. Non. ab. 25. 3. Inst. 212. Thelwall, b. 1. c. 15. f. 20. (d) Co. Litt. 288. But the contrary seems to be holden, Dyer 223. and it is made a *quare*, 38. Edw. 3. 14. (e) Vide Rastal 332. 2. Hale 399. (f) Finch 467. 3. Inst. 52. 212. 3. St. Tr. 324. B. Coro. 166.

(g) 3. Inst. 212. Sect. 23. If such (g) outlawry appear to the Court to be erroneous, whereof any one as *amicus Curie* may inform them, the party shall have Counsel assigned (1) him to take advantage of the error; but if he will neither bring a writ of error, nor plead in convenient time, and the outlawry be voidable only and not void, the proper execution shall be (h) awarded against him, but no sentence pronounced, because the outlawry is a judgment, and no man shall have (i) two judgments for one offence. 1. Burrow 639. 2. Hale 408. (b) 3. State Trials 323. 334. (i) Finch 389. S. P. C. 34. F. Coro. 313. 11. H. 7. 4. Ab. B. Coro. 226. 27. Affize 54. Ab. B. Coro. 110. 9. Edw. 4. 28. Ab. B. Coro. 55. 12. Co. 100. F. Esch. 14. Ch. 23. sect. 53. Ch. 36. sect. 1. Yet sentence was given upon one outlawed of felony, 3. H. 7. 7. Ab. B. Coro. 134. (1) The Court cannot assign Counsel upon an outlawry for the diminishing the coin till the defendant has pleaded, and then he may have Counsel upon the *collateral matter*, whether he was out of the realm, &c. 1. Burr. 638. both as to law and fact, though not on the indictment itself, because treason in diminishing the coin is excepted out of the 7. Will. 3. Sira. 824.

(k) Finch 389. 467. Sect. 24. For the nature of abjuration (which was also an (k) attainder of itself), being wholly obsolete at this day, I shall refer to the citations (l) in the margin. S. P. C. 34. 217. 122. F. Coro. 313. 335. 3. Inst. 216, 217. (l) Supra c. 9. sec. 44. and 32. 6. 3. Inst. 216, 217.

(m) B. Corone 166. and the other books under-cited. Sect. 25. It seems to be generally (m) agreed, that a man can no other way be attainted of treason or felony at this day, but only by judgment by express sentence, or by outlawry or abjuration; and therefore where an appellee was slain in the field upon a wager of battle, (n) judgment was given, (n) Judgm. 225. Coke Litt. 390. 3. Inst. 212. 2. Inst. 283. Plow. 261, 262. B. Esch. 24.

quod

quod suspendatur per collum, in order to intitle the lord to his escheat. But I know of no other case wherein it is clear at this day, that a man may be attainted after his death: It is said indeed in a note in *Fitzherbert's Abridgement* of a case in the time of *Edward the Third*, (a) that in eyre it hath been seen that a man hath been attainted by presentment after his death. Also it was holden by (b) MARKHAM in the time of *Henry the Fourth*, that if he who levies war against the king be slain in battle, his lands may be seized by the king. And it is said in the (c) *Fourth Report*, that if one aiding the king's enemies be slain in open rebellion, and the chief justice of the king's bench, who is the sovereign coroner of *England*, make a record of it upon the view of the body, and return it into the king's bench, he shall forfeit his lands (2). And this seems agreeable to 34. Edw. 3. c. 12. whereby the king expressly reserves his prerogative as to forfeiture of wars, but grants that he will in no other case seize lands for treason whereof the party is not attainted in his life. Yet the contrary opinion seems to be holden in the *First* and *Third* (d) *Institutes*, and also by (e) *Hale*; and to this (f) *Staundforde* seems also to incline.

coign; and it is said by Brown, in *Plow.* 263. that the ancient law was so. See also *Plow.* 262. and *Dalt.* c. 89. (c) 4. *Coke* 57. (d) 3. *Inft.* 27. *Coke Litt.* 13. (e) *Summary* 17. 1. *Hale* 342, 343. (f) *S. P. C.* 188, 189.

(2) This may be true as to goods but not as to lands, because none can be attainted after his death but by act of parliament. 2. *Hale* 53. Also see this point largely treated of 1. *Hale* 342 to 345.

CHAPTER THE FORTY-NINTH.

O F

F O R F E I T U R E.

AND now I am to shew the consequences of an attainder, or conviction of treason and felony.

I shall consider under the following particulars,

1. What shall be forfeited by the offender.
2. Where his wife loses her dower.
3. How far his blood is corrupted.

As to THE FIRST POINT, I shall endeavour to shew,

1. What is forfeited by the common law.
2. What by statute.
3. To what time the forfeiture shall relate.
4. What shall be done with the goods of an offender before they are actually forfeited.

As to the first particular, *viz.* What is forfeited by the offender, by the common law.

I shall endeavour to shew,

1. Where his lands are forfeited by the common law ; and,
2. Where his goods.

AND FIRST, As to the forfeiture of lands.

Sec. 1. It seems agreed, that, by the common law, all lands of inheritance whereof the offender was (a) seised in his
(a) 3. Inst. 191.
 3. Co. 2, 3.
 1. Hale 249,
 own 241, &c.

(a) 3. Inf. 19. own right, and also all rights of (a) entry to lands in the hands of a wrong doer, are forfeited to the (b) king by an attainder of high treason, and to the lord of whom they are immediately holden, by an attainder of petit treason or felony. And that the lands whereof a person attainted of high treason dies (c) seised, of an estate in fee, are actually veited in the king without any office, because they cannot descend, the blood being corrupted, and the freehold shall not be in abeyance.

3. Co. 2, 3.
(b) See 25. Ed. 3. c. 2.
(c) Co. Litt. 2. 392.
4. Co. 58.
1. Leonard 21.
Infra f. 23.
1. Hale 242.
4. Comm. 375.

Sec. 2. But it seems (d) agreed, that, by the common law, such lands were not veited in the actual possession of the king during the life of the offender without an office.

(d) 3. Coke 10.
Co. Litt. 2.
S. P. C. 191.
B. Corone 208. 210. 1. Leonard 21. Infra f. 23.

Sec. 3. Also it (e) seems clear, that the lord cannot enter into the lands holden of him upon an escheat for petit treason or felony, without a special grant, till it appear by due process that the king hath had his prerogative of the year, day, and waste.

(e) S. P. C. 191.
F. Traverse 48.
Affize 166.

Sec. 4. It is (f) said, that the inheritance of things not lying in tenure, as of rents-charge, rents-seck, commons, &c. shall be forfeited to the king by an attainder of high treason, and that the profits of them shall be also forfeited to the king by an attainder of felony during the life of an offender, and that the inheritance shall be extinguished by his death; for it cannot escheat because there is no tenure, nor descend because the blood is corrupted.

(f) 3. Inf. 19. 21.
4. Comm. 378.

Sec. 5. But it is (g) said, that no right of action whatsoever to lands of an estate of inheritance are forfeited, either by the common law or by the statute; and it seems agreed that no (h) right of entry into such lands whereof there is a tenant by feoffment, or other title, nor (i) use (except only lands conveyed (k) fraudulently with an intent to avoid a forfeiture), nor (l) condition, were liable to be forfeited before the statute of 33. Hen. 8. and that (m) land in tail could not be forfeited after the statute of *Westminster the second*, but only for the life of the tenant in tail, till the statute of 26. Hen. 8. c. 13.

(g) 3. Coke 2, 3.
7. Coke 13.
1. Hale 242, 243.
Vide infra f. 23, 24, 25.
(h) F. Ent. Cong. 23.
3. Coke 2, 3.
3. Institute 19.
(i) 3. Inf. 19.
1. Hale 247.
(k) 2. R. Abr. 34.
(l) 3. Inf. 19. 1. Hale 244. (m) 3. Inf. 19. S. P. C. 187. Plowden 54, 55. Dyer 289. Co. Litt. 130. 372. 391. 1. Bunb. 92. Vide the case of John Gordon in the House of Lords, Foster 95.

Sec. 6. It (n) seems, that the profits of such lands, whereof a person attainted of felony is seised of an estate of inheritance

(n) 3. Inf. 19.
F. Affize 166.
Forfeita. 23.
4. Affize 4.

heritance in the right of his wife, or of an estate for life only in his own right, are forfeited to the king, and that nothing thereof is forfeited to the lord.

Secl. 7. It seems (*a*) agreed, that by force of a special (*a*) 2. Jones custom a copy-hold of inheritance may be forfeited by an attainer or conviction of treason or felony: Also it hath been (*b*) holden, that by custom it may be forfeited for treason or felony, even without a conviction: Also it (*c*) seems the stronger opinion, that it shall be forfeited by an attainer of treason or felony of common right, without any special custom, but (*d*) not by a conviction only (1).
 1. Jones 151.
 1. Levinz 263.
 1. Leonard 1.
 (b) 1. Bullf.
 13.
 2. Brownl.
 217 to 220.
 See Godbolt
 267.

(*c*) 2. Jones 189. 2. Ventris 38, 39. 5. Coke 117. 2. Keble 451. Co. Copyholder f. 58. (*d*) 1. Lev. 263. 2. Keble 251. (1) But if the attainer happens before the tenant is admitted, the copyhold is not forfeited, but shall go to the heir at law. 2. Willon 13. 2. Ventris 38.

Secl. 8. It seems (*e*) agreed, that by the common law, upon an attainer of felony, the king had a right utterly to waste the lands holden of any but himself, where the person attainted was seised of an estate of inheritance, either in his own or in his (*f*) wife's right. (*g*) And it is said by some, that the king hath both this right, and also a right to hold such lands for a year and a day: but it is holden by others, that the right to hold over the lands for a year and a day was given to the king in lieu of the waste; and this seems (*b*) implied in MAGNA CHARTA, chap. 22. which saying, "that the king shall not hold over the lands of those convicted of felony but for one year and a day," and making no mention of the waste, seems plainly to intimate, that at the time of the making of that statute the king was thought to have no other right but only to the year and day. Yet the statute of *Prærogativa Regis*, 17. Edw. 2. having declared the king's right to the year and day, and also to the waste: it seems to have been the more general (*c*) opinion since that time, that he hath a right to both. Indeed if this statute had been against the express purview of MAGNA CHARTA, it would have been clearly repealed by those many subsequent statutes which repeal all statutes contrary to MAGNA CHARTA; but being not contrary to the express words of it, but only to what is argumentatively drawn from it, it may be well argued that it is still in force.
 (e) 4 Coke 124.
 S. P. C. 190, 191.
 Staund. Prerog. 48, 49, 50.
 (f) F. Cor. 327, 332.
 (g) 2. Inst. 36, 37.
 S. P. C. 190, 191.
 Staundf. Prerog. 48, 49, 50.
 (b) See the books above cited; yet it seems admitted 8. Edw. 3.
 F. Trav. 489.
 Prescription 50.
 that the king was intitled to the waste as to the year and day since this statute.
 (1) B. Cor. 2. 6. 208, 209, 210.

F. Corone 290, 309, 310, 312, 327, 358. Register 165. F. Traverse 19. S. P. C. 190, 191. Staundf. Prerog. 48, 49, 50. 49. Ed. 3. 11. 4. Coke 117. But 49. Af. fize 21. the contrary seems to be holden. 2. Inst. 36, 37. F. Ulag. 2. See also F. Corone 285, 290, 332, 344. And it seems agreed, that the king's prerogative of the waste is not grantable over, except only as to such interests which by virtue of it are actually vested in him. F. Cor. 310. S. P. C. 191. Staundforde's Prerogative 50. 2. Inst. 37. 4. Comm. 378.

As to the second point, *viz.* Where *the goods* of the offender shall be forfeited for treason or felony.

I shall endeavour to shew,

1. What goods are liable to such forfeiture.
2. In what cases.

As to the first of these particulars.

Secd. 9. It seems (a) agreed, that all things whatsoever which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath, or is intitled to in his own right, and not as executor or administrator to another, are liable to such forfeiture.

(a) Staundf. Prerog. 45, 46.
S. P. C. 187.
C. Car. 566.
12. Coke 121.
It is holden Staundforde's Prerogative 44. and S. P. C. 188. c. 28. that a felon shall forfeit the goods of others stolen by him; but the authorities cited to this point, *viz.* 44. Ed. 3. 44. F. Corone 317, 318, 319. 323. 334. 376. 380. do not seem fully to come up to it, except where such goods are waived, or of such a nature as not to be distinguishable from others of the like kind, as corn out of a bag, &c. Vide 2. Leonard 5, 6. 1. Anderson 19. Moor 100. Dyer 309, 310. that a term limited to executors and not vested in the party himself, is not forfeitable. Sed vide Foster 223.

(b) C. Jac. 312, 313.
Hobart 214.
and the books cited to the following section.

Secd. 10. Also it (b) seems to be settled, that a bond taken in another's name, or a lease made to another in trust for a person who is afterwards convicted of treason or felony, are as much liable to be forfeited, as a bond made to him in his own name, or a lease in possession.

(c) 1. Keble 564. 608. 644. 763. 772.
1. Levinz 279.
Lane 54. 113.
1. Modern 16. 38.
Hardres 466.
1. Ander. 294.
Raym. 120.
2. R. Abr. 34.
1. R. Abr. 343.
March 45. 88. 1. Siderfin 260. 403. 1. Keble 909.

Secd. 11. Also it (c) seems to be in a great measure settled, that the trust of a term granted by a man for the use of himself, his wife and children, &c. is liable in like manner to be forfeited, if fraudulently made with an intent to avoid a subsequent forfeiture; but that it shall be forfeited so far only as it is reserved to the benefit of the party himself, if made *bona fide*, whether before or after marriage, for good consideration without fraud, which is to be left to a jury on the whole circumstances of the case, and shall never be presumed by the Court where it is not expressly found.

(d) 1. Keble 564. 644. 763. 772.
1. Lev. 279.
1. Mod. 16. 38.
Vide inf. c. 26.

Secd. 12. It hath been (d) adjudged, that a power of revocation of the trust of a settlement reserved to the grantor is not liable to be forfeited, if it depend on something personal to be done by the grantor himself, as the making the deed of revocation under his own hand and seal.

Secd.

SECT. 13. PERSONAL THINGS liable to forfeiture shall be forfeited in the following cases :

FIRST, Upon a conviction of treason or felony (a).

(a) 5. Coke
109.

Sup. c. 33. f. 129. and the books cited to the three foregoing sections.

4. Com. 200.

SECT. 14. SECONDLY, Upon a *fugam fecit*, found before a coroner, upon an inquisition of death taken upon view of a dead body; as to which it is (b) agreed, that wherever a person found guilty by such inquest, either as a principal, or as an accessory (c) before the fact, is found also to have fled for the same, he forfeits his goods absolutely, and the issues of his lands till he be acquitted or pardoned. Also it is (d) agreed, that where one indicted of any capital felony, either as principal or accessory before or after, before justices of oyer, &c. is acquitted at his trial, but found to have fled, he shall incur the like forfeiture of his goods, but not of the issues of his lands, because by the acquittal the land is discharged, and consequently the issues. And it hath been (e) holden, that the law is the same as to the finding of a *fugam fecit* upon an acquittal of an indictment of petit larceny. But it is (f) certain, that the party may in all cases, except that of the coroner's inquest, traverse the finding of a *fugam fecit*. Also it seems (g) agreed, that whenever the indictment against a man is sufficient, the finding a *fugam fecit* will not hurt him; and that in all cases the particulars of the goods found to be forfeited may be traversed.

(b) S. P. C.
183, 184. 191,
192.

Staundf.

Prerog. 46.

Keilway 68.

Dyer 239.

5. Coke 110.

(c) Secus if

he be found

accessary af-

ter, for the

indictment is

so far void.

S. P. C. 184.

Sup. c. 9.

f. 26.

(d) S. P. C.

184. 191.

Summary 271.

Keilway 68.

5. Coke 110.

F. Forfeiture

35.

(e) S. P. C.

184.

F. Corone 206. (f) Summ. 271. 36. H. 6. 26. Sup. c. 9. f. 51, 52. F. Corone 22. (g) Summary 271. S. P. C. 184. 47. Edw. 3. 26. Ab. F. Traverse 18. B. Corone 17. But the jury very seldom find *the flight*. Vide 4. Comm. 380.

SECT. 15. THIRDLY, Upon a default till the award of an *exigent*, as to which it is (b) agreed, that if one make such a default either upon an appeal or indictment of a capital felony, he forfeits his goods, unless he was pardoned before the *exigent* was awarded; and it hath been (i) holden, that the law is the same as to such a default upon an indictment of petit larceny: However it is clear, that wherever goods are so forfeited, they are not saved by an acquittal at the trial. But it seems (k) agreed, that they are saved by a reversal of the award of the *exigent*, for an error either in fact or in law; as for the imprisonment of the defendant at the time when the *exigent* was

(b) F. Corone
181.

Forfeiture 28.

S. P. C. 183,

184.

Staundf.

Prerog. 47.

B. Corone 8.

Finch 352.

1. R. Abr.

793.

41. Affize 13.

22. Affize 81.

C. Eliz. 4. 72

5. Coke 110, 111. (i) Summ. 271. (k) 5. Coke 110, 111. 43. Edw. 3. 17, 18. 1. R. Abr. 743. S. P. C. 184. Co. Litt. 259. Staundforde's Prerogative. 47. Cro. Jac. 464.

awarded, or for a defect in the indictment, appeal, or process.

Sec. 16. FOURTHLY, Upon a (a) presentment by the oaths of twelve men, that a person arrested for treason or felony fled from, or resisted those who had him in custody, and was killed by them in the pursuit or scuffle.
 (a) 5. Coke 109. F. Coro. 289, 290, 291. 312. S. P. C. 184. 189. 191, 192. 3. Inst. 56. 217. Plowden 260. But Staundforde makes a *quare* whether the law in this point be not altered by 34. Edw. 3. 12. taken notice of above, c. 48. f. 25. Staundforde's Prerogative 46.

(b) S. P. C. 186. *Sec. 17.* FIFTHLY, By being (b) waived or left by a felon in his flight, from those who either actually do pursue him, or are apprehended by him so to do, whereby he forfeits the goods so waived, whether they be his own (c) proper goods, or the goods of others stolen by him, which shall not be restored to the right owners but upon a proper prosecution, as hath been more fully shewn, chap. 23. from sect. 49 to 58.
 (c) S. P. C. 186. and 29. E. 3. 29. Ab. F. Avo. 253. seems exprefs to this purpose. But 3. Inst. 217. and 5. Coke 109. it is said, that the felon's proper goods are not forfeited as waifs, but as the goods of a fugitive.

As to the second particular, *viz.* What is forfeited by statute.

Sec. 18. By 26. Hen. 8. c. 13. "Every offender and
 " offenders being hereafter lawfully convicted of any man-
 " ner of high treasons by presentment, confession, ver-
 " dict, or process of outlawry, according to the due course
 " and custom of the common laws of this realm, shall
 " lose and forfeit to the king, his heirs and successors, all
 " such lands, tenements, and hereditaments, which any
 " such offender or offenders shall have of any estate of in-
 " heritance, in use or possession, by any right, title or
 " means, within the realm of *England*, or elsewhere with-
 " in any of the king's dominions, at the time of any such
 " treason committed, or any time after. Saving to every
 " person and persons, their heirs and successors, other than
 " the offenders in any treasons, their heirs and successors,
 " and such person and persons as claim to any their uses,
 " all such rights, titles, interests, possessions, leases, rents,
 " offices, and other profits, which they shall have at the day
 " of committing such treasons, or at any time before, in
 " as large and ample manner as if this act had never been
 " had nor made."—And the same is enacted in near the
 same words by 5. & 6. Edw. 6. c. 11.

Sec.

Sec. 19. By 33. Hen. 8. c. 20. sect. 2. "If any person shall be attainted of high treason by the common laws or statutes of this realm, every such attainer by the common law shall be of as good strength, value, force and effect, as if it had been done by authority of parliament; and that the king, his heirs and successors, shall have as much benefit and advantage by such attainer, as well of uses, rights, entries, conditions, as possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of parliament, and shall be deemed and adjudged in actual and real possession of the lands, tenements, hereditaments, uses, goods, chattels, and all other things of the offenders so attainted, which his highness ought lawfully to have, and which they being so attainted ought or might lawfully lose or forfeit, if the attainer had been done by authority of parliament, without any office or inquisition to be found of the same; any law, statute, or use of the realm to the contrary thereof in any wise notwithstanding."

Attainers for high treason by the common law shall be as effectual as attainers by parliament.

Sec. 20. By 33. Hen. 8. c. 20. f. 3. there is a "Saving to all and every person and persons, and bodies politic, and their heirs and assigns, and successors, every of them (other than such person and persons which hereafter shall be attainted of high treason, and their heirs and assigns, and every of them, and all and every other person and persons, claiming by them or any of them, or to their uses, or to the uses of any of them, after the said treasons committed), all such right, title, use, possession, entry, reversions, remainders, interests, conditions, fees, offices, rents, annuities, commons, leases, and all other commodities, profits and hereditaments whatsoever they or any of them should, might or ought to have had, if this act had never been had or made."

In the construction of these statutes the following points seem most considerable.

Sec. 21. FIRST, It is (a) settled, that they are not repealed by 1. Mary, sess. 1. c. 1. which enacts, "That no pains of death, penalty or forfeiture in any wise ensue or be to any offender or offenders, for the doing or committing any treason, petit treason or misprision of treason, other than such as be in the statute 25. Edw. 3. ordained and provided;" for the words, "other than such as be within the statute of 25. Edw. 3. &c." shall not be taken to refer to the pains, penalties and forfeitures which are mentioned in the beginning of the sentence, but

(a) S. P. C. 187.
3. Inst. 19.
Dyer 28.
1. Hale 241.
356.

to treasons; petit treasons, and misprision of treason, which are last mentioned.

(a) S. P. C.

187.
Co. Litt. 372.
391. and the
books cited to
the following
sections.

(b) Dyer 322.

SECT. 22. SECONDLY, It is (a) agreed, that estates in tail are forfeited by force of those words in 26. Hen. 8. "of any estate of inheritance," which must be void, if they do not include estates in tail; for estates in fee simple were forfeited before. Also it hath been (b) adjudged, that where lands are given to a man and his wife, and the heirs of their two bodies, the intail is forfeited by his attainder, and the heir is as much disabled as if the gift had been made to the heirs of his body in general.

(c) 3. Co. 2. 3.

1. Leon. 270.

Moor 125.

Hobart 340.

C. Edit. 389.

cited and a-

greed, C. Car.

428.

7. Co. 13.

Meer 523.

Lit. Rep. 100.

1. Hale 242.

(d) 3. Co. 2.

Hob. 340, 341.

7. Coke 13.

4. Coke 58.

(e) 3. Co. 2. 3.

1. Hale 242.

(f) 3. Co. 11.

4. Coke 58.

1. Leon. 21.

6. Coke 95.

Supra f. 1, 2.

SECT. 23. THIRDLY, It was (c) settled in the *Marquis of Winchester's Case*, that the right to a writ of error to reverse an erroneous common recovery is not forfeited by these statutes. Also it is (d) agreed, that a mere right of action to lands in the hands of a stranger, as of a discontinuee, or of the heir of a disseisor, is not forfeited: (e) But, that a right of entry into lands to which a person attainted of high treason is intitled, is as much forfeited as lands in possession. But yet the king shall (f) not be adjudged in possession of such lands without an office, and *seire facias*, or seizure on such office; for the words, "that the king shall be deemed in possession without office," shall have this construction, that he shall be in possession without office in the same manner as he should have been upon an office found at common law: But at the common law, if a disseisee had been attainted of high treason, and the *seisin* found by office, the king should not have been in possession without a *seire facias*, or a seizure at least.

(g) C. Car.

427.

Vide Plow.

552.

1. Hale 243.

SECT. 24. FOURTHLY, After two contradictory judgments upon the same point, it was at last (g) settled by a majority of the judges in *Stone and Newman's Case*, that where a tenant in tail of the gift of the crown makes a feoffment in fee, the reversion being still in the crown, and afterwards is attainted of high treason, the right of the intail is forfeited to the crown; because the reversion continuing always in the crown, the intail could not be discontinued, but the heir might have entered after the death of the feoffor, without bringing any action; and though the intail by such a feoffment be put in abeyance as to any benefit which the feoffor himself may claim from it; yet since it is not turned to a right of action, and would have continued still in him for the benefit of the heir, if he had not been attainted (as appears from the form of a writ of *formedon*, which supposes that the right descended to the heir from the feoffor, and consequently that it was in him at his death), it shall likewise continue in him for the benefit of the king.

SECT.

Sect. 25. FIFTHLY, It was solemnly adjudged in the exchequer chamber in (a) *Sheffield's Case*, and a judgment to the contrary in the exchequer reversed, that where one attainted of high treason is seized of a defeasible estate in tail, and hath at the same time a right to an ancient intail which is discontinued, he forfeits both the intail in possession, and the right to the old intail; for the first is within the express words of 26. Hen. 8. and the latter within those of 33. Hen. 8. And it by no means follows, that because naked rights of action to lands in the hands of the heir of a disseisor, or of a discontinuee, or not within the meaning of the statute, as it is (b) settled that they are not; therefore also a right to lands in the hands of the person attainted himself is not within the meaning of it; for the forfeiture of such naked rights might not only be of dangerous consequence in unsettling possessions, but might also be highly prejudicial to strangers, whom the statute by an express saving plainly intends to favour; but the forfeiture of the offender's right to his own lands can be of no prejudice to any but himself and his heirs, to whom the statute is so far from intending any favour, that it expressly excludes them from all the benefit of the saving clause.

Sect. 26. SIXTHLY, It seems (c) agreed, that a power of revoking the uses of a settlement may be forfeited by force of 33. Hen. 8. if the execution of it require nothing but what may be as well performed by any other person as by the party himself by whom it was reserved; as the tender of a ring, &c.

(c) 7. Coke 12, 13.
1. Hale 245.
Popham 18.
1. Anderson 293.
Moor 303.
4. Leonard 135. Palmer 433, &c. 1. Roll. 142.

Also it was adjudged in (d) *Englefield's Case*, that the mention of such considerations and inducements for the reserving of such a power of revocation in the preamble of it, as are inseparable from the person, do not alter the case, if nothing of this kind be inserted in the proviso itself by which it is reserved.

(d) 7. Coke 12. and the other books above cited.
Cited and agreed.
2. Keble 566, 763, 773.
1. Levinz 279. Lane 44. 1. Roll. 142.

But it is agreed, that if the proviso by which such a power is reserved require something inseparably annexed to the person, it keeps it out of the statute; and therefore in the (e) *Duke of Norfolk's Case*, where there was this proviso, "that if the Duke should be minded to alter and revoke the uses, and signify his mind in writing under his hand and seal, that then, &c." it was clearly adjudged, that the power of revocation was not forfeitable, because it depended on the duke's signifying his mind in writing under his proper hand and seal, which none but himself could do.

(a) Sup. f. 12. Also it was adjudged in (a) *Main's Case*, that the law is
 1. Hale 146. the same where such proviso doth not expressly require the
 (b) Palmer party's signifying a change of mind, but only that the deed
 429. of revocation be under his proper hand and seal. (b) But if
 Latch 25, 26. such proviso require only the tender of a ring by the feoffor,
 &c. 70. 102. *ipso adiuncto declarante* that the tender is to the intent to avoid
 1. Jones 135. the feoffment, it seems unsettled, whether it come within
 1. Ventris 129. the same construction.
 1. Modern 40.

(c) Plowden *SecT. 27. SEVENTHLY*, It (c) seems, that an annuity
 381, 382. granted to a man *pro consilio impendendo*, is not forfeitable by
 (d) Plowden these statutes: also it seems (d) doubtful whether an office
 379, &c. granted to a man for life, and requiring skill and confidence,
 (e) Plowden be forfeitable; but if it be (e) granted in fee, it seems clear
 379. that it may be forfeited even by the common law; because
 the grantor in giving such an estate, which shall descend to
 all the heirs of the grantee, however unqualified, seems plain-
 ly not to have been induced to make his grant from any
 consideration of the peculiar merit of the persons who are
 to execute the office.

(f) 1. Levinz *SecT. 28*. It hath been (f) adjudged, but not without
 169. great difficulty, that an act of parliament that certain per-
 3. Kettle 450. sons shall forfeit all their lands, possessions, rights, interests,
 651. 712. and hereditaments, and other things of what nature soever,
 1. Modern extends to estates in tail, by force of the words "all interests
 130, 131. "of what nature soever." Yet it is (g) agreed, that the
 1. Jones 57. statutes of *præmunire*, which give a general forfeiture of all
 1. Vent. 299. the lands and tenements of the offender, extend not to land
 (g) Co. Litt. in tail.
 130. and the
 books above
 cited.

(h) Summ. 8. *SecT. 29*. It is (h) holden, that a saving against the
 1. Hale 704. corruption of blood in a statute concerning felony, doth by
 3. Inst 47. 90. necessary consequence save the land to the heir; because the
 Salkeld 85. escheat to the lord for felony is only *pro defectu tenentis*, oc-
 casioned by the corruption of blood. Also it is holden,
 that a saving of the land to the heir prevents the corruption
 (i) Salk. 85. of blood, and also the loss of dower. But it hath been (i)
 adjudged, that a saving against the corruption of blood in a
 statute concerning treason, doth not save the land to the
 heir, because in treason the land goes to the king by way of
 immediate forfeiture, and not by escheat.

As to the third particular, *viz.* To what time the for-
 feiture shall relate.

(k) F. Forf. 3. *SecT. 30*. It seems (k) agreed, that the forfeiture upon an
 30. attainder either of treason or felony, shall have relation to
 30. H. 6. 5. F. Counterp. de Voucher 30. Co. Litt. 2. 3. Coke 170. 38. Edw. 3.
 S. P. C. 192. 32. Plowden 488. 1. Hale 360, 361.

he time of the offence, for the avoiding of all subsequent alienations of the lands; but to the time of the (a) conviction, or *fugam fecit* found, &c. only, as to chattels; unless the party were (b) killed in flying from or resisting those who had arrested him; in which case it is said, that the forfeiture shall relate to the time of the offence.

Exposition 26. Forfeiture 119. F. Corone 296. 1. Hale 362. (b) Vide sup. f. 16. S. P. C. 192. F. Corone 290. 1. Hale 362.

SECT. 31. But it seems (c) unsettled, Whether in *præsumere* it shall relate to the time of the offence, or only to that of the judgment.

SECT. 32. It seems the better (d) opinion, that no attainer whatsoever shall have any relation as to the mesne profits of the lands of the person attainted, but only from the time of the attainer.

made a *quære* S. P. C. 191. and the contrary seems holden F. Corone 290. 344. See also F. Forfeiture 16. F. Corone 374. Finch 326, 327.

As to the fourth particular, *viz.* What shall be done with the goods of an offender both before and after they are actually forfeited.

SECT. 33. It seems to have been always (e) agreed, that one indicted or appealed of treason or felony may *bona fide* sell any of his chattels real or personal for the sustenance of himself and family until they be actually forfeited.

SECT. 34. Also it seems (f) agreed, that the goods of such person can in no case be lawfully removed out of his house until they be forfeited.

SECT. 35. Yet according to the general tenor of the old (g) books, the goods of one (h) arrested for treason or felony, shall be removed out of his house, and put in the hands of the king's officers, until he be attainted, his goods shall not be removed out of his house, but shall be kept by his neighbours until, &c. and in the mean time the felon ought to live upon his goods. Vide 41. Affize 13. Ab. F. Corone 9. Forfeiture 7. Refeiser 3. Office and Officer 3. F. Trespass 7. Bar. 196. the 2d. it is said, that no minister of the king ought to take the chattels of an appellee of felony away with him, but to seize them, and cause the party to find surety that they shall not be cloined, &c. And if the party cannot find surety, he ought to deliver them to the neighbours, &c. And in the last case of 7. H. 4. Ab. F. Cor. 83. and B. Forfeit 10. it is said, that where one is indicted of felony, until he be attainted, his goods shall not be removed out of his house, but shall be kept by his neighbours until, &c. and in the mean time the felon ought to live upon his goods. Vide 41. Affize 13. Ab. F. Process 183. B. Forfeit. 40. 12. H. 3. 13. in which books it is said, that goods shall not be seized till they be forfeited. (b) The old writ recited Bracton b. 3. c. 18. sect. 2. and Fleta b. 1. ch. 26. sect. 2. is express to this purpose: yet in 3. Inst. 228. it is said, that the goods of any delinquent cannot be inventoried and the town charged therewith before the owner is indicted of record; and a note in Summ. 269. seems to be to the same effect, and 1. Hale 367.

(a) 1. St. Tr. lony, may by the purview of an ancient statute, which (a) 994, 995. seems to continue still in force, be immediately inventoried
4. St. Tr. 65, and appraised; after which, and on surety found that they
66. shall be forthcoming, they shall be kept by the bailiffs of
S. P. C. 139. the party arrested, and, for want of such surety, by his
neighbours, till he be convicted, or found to have fled, &c;
whereby they are actually forfeited.

Sect. 36. Also it was enacted by the statute *de Officio Coroneris* (set forth more at large ch. 9. sect. 19, 20.), that, where one is found guilty of murder by a coroner's inquest upon view of a dead body, the coroner shall inquire what goods he hath, and cause them to be valued and delivered to the township, &c. But so much of this statute as enables
(b) S. P. C. 52. the coroner to seize the goods, (b) seems to be repealed by
1. Rich. 3. (set forth more at large sect. 38.), unless the party indicted be found also to have fled.

Sect. 37. Also by 25. Edw. 3. c. 14. set forth more at large ch. 27. sect. 116. it is enacted, "That in the second
" *capias* given by that statute on the return of a *non inventus*,
" it shall be comprised, that the sheriff shall cause the
" party's chattels to be seized, and safely kept till the day
(c) S. P. C. " of the writ or precept returned, &c." and this is still in
193. (c) force, notwithstanding the statute of 1. Rich. 3. c. 3.
1. Hale 366. for this prohibits only the seizing of the goods of those
Straund. who are arrested,
Prerog. 48.

Sect. 38. And so far as it relates to this purpose, is enacted by the said statute 1. Rich. 3. c. 3. as followeth:
" And that no sheriff, under-sheriff, nor escheator, bailiff
Vile 1. Hale " of franchise, or any other person, take or seize the goods
366, 367. for a " of any person arrested or imprisoned for suspicion of
variety of ob- " felony, before that the same person so arrested and im-
servations " prisoned be convicted or attainted of such felony ac-
upon this act. " cording to the law, or else the same goods otherwise law-
" fully forfeited, upon pain to forfeit the double value of
" the goods so taken, to him that is so hurt in that behalf,
(d) For preced- " by (d) action of debt, &c."
ents of such
actions, see 1. Lutwyche 132. C. Eliz. 749.

(e) Vile sup. *Sect. 39.* This statute is said to be in (e) affirmance of
1. 33, 34, 35. the common law, and hath been (f) adjudged to extend as
S. P. C. 193. well to the seizure of money as of any other chattel.
(f) 1. Ray. 414.

Sect. 40. It seems plain from this statute, that goods
(g) Co. Litt. may be seized as (g) soon as they are forfeited; and it
394. seems,

seems, the whole township is answerable (a) for them to (a) F. Corone the king (3), and may feize them (b) wherever they can be found. ^{300. 347. 306. 13. H. 4. 13. 6. Ab. F. Forf.}

32. 22. Assize 81. Ab. F. Corone 181. B. Charge 45. Forfeiture 32. S. P. C. 193, 194. Staundford's Prerogative 47. 47. E. 3. 26. (b) 23. Assize 81. Ab. F. Corone 181. B. Charge 45. Forfeiture 32. Staundford's Prerogative 47.

(3) Whether the king takes the forfeited goods, subject to the debts of the party, vide Douglas 542.

Sec. 41. And at the common law it was no (c) plea for (c) F. Corone such township, that the goods were delivered to the custody ^{300. 347. S. P. C. 194.} of J. S. who imbezzled them, &c. But it is enacted by 31. Edw. 3. c. 3. "That if any man or town be charged in the exchequer by estreats of the justices of the chattels of fugitives and felons, and will alledge in discharge of him another which is chargeable, he shall be heard, and right done to the other."

CHAPTER THE FORTY-NINTH

CONTINUED,

OF

LOSS OF DOWER.

AS TO THE SECOND POINT, viz. Where the wife loses her dower,

SECT. 42. It is agreed, that before the statute of 1. Edw. 6. ch. 12. the wife not only lost her dower at common (a) (a) S. P. C. law, but also her dower (b) *ad osium ecclesiæ*, or *ex assensu* 194. *patris*, or by special (c) custom (except that of (d) gavel- Co. Litt. 31. kind), by an attainder of any treason or (e) capital felony, 37. 41. 392. whether (f) committed before or after the marriage, and Litt. f. 747. 3. Inst. 47. whether the lands were in the hands of a (g) feoffee, or for- 211. feited to the king, or escheated to the lord of the fee, and 1. Hale 359. though the (b) attainder were pardoned, &c. (b) Co. Litt. 37. 41.

S. P. C. 195. Bracton 311. (c) Co. Litt. 41. Bracton 311. 37. 41. Winch 27. (d) Bracton 311. (e) Co. Litt. 41. 1. Hale 359. (f) Co. Litt. 31. (g) 3. Inst. 216. Sav. 54, 55. Co. Litt. 41. Benlowe 55, 56, 57. Dyer 140. Moor 639. Con. by Vavafor, Litt. f. 55. (b) 1. Leonard 3.

SECT. 43. But it (i) seems, that the wife never forfeited (i) Co. Litt. lands given jointly to her husband and her, whether by way 37. of frank-marriage or otherwise, but only for the year and 3. Inst. 216. day and waste (k). Bracton 129, 130.

(k) Bract. 129. Supra sect. 8. Con. Bract. 130.

SECT. 44. Also it hath been (l) adjudged, that if a hus- (l) 3. Inst. 216. band having levied a fine with proclamations, is afterwards Moor 639. erroneously attainted of high treason, and the five years pass 879. after his death, and then the outlawry is reversed, the wife may pursue her title of dower within five years after such reversal; because being barred of her dower by the attainder while it stood in force, which attainder she could no way reverse, she had no remedy to pursue her title of dower within the five years, and therefore shall not be barred by her non-claim.

SECT. 45. By 1. Edw. 6. c. 12. f. 17. "Albeit any person See Harg. Co. shall be attainted of any treason or felony whatsoever, Litt. 41. notes. " yet

“ yet that notwithstanding every woman that shall fortune
 “ to be wife of the person so attainted, shall be endowable
 “ and enabled to demand, have, and enjoy her dower in like
 “ manner and form as though her husband had not been
 “ attainted, &c.”

Stat. 46. But this is repealed as to treason by 5. and 6. Edw. 6. c. 11. par. 9. by which it is enacted, “That the wife
 “ whose husband shall be attainted of any treason whatso-
 “ ever, shall in no wise be received to ask, challenge, de-
 “ mand, or have dowry of any the lands, tenements, or
 “ hereditaments of the person so attainted during the said
 “ attainder in force.” And this hath been construed (a)
 to extend as well to an attainder of petit treason, as of high
 treason.

(a) S.P.C. 195.

Dyer 140.

Co. Litt. 37.

392.

1. Hale 359.

CHAPTER THE FORTY-NINTH

CONTINUED.

OF

CORRUPTION OF BLOOD.

AS TO THE THIRD POINT, *viz.* How far the blood is corrupted by an attainder of treason or felony, the following particulars seem most remarkable.

Sect. 47. FIRST, It is (*a*) agreed, that by (*b*) such an attainder the blood is so far stained or corrupted, that the party loses all the nobility or gentility he might have had before, and becomes ignoble. *(a)* 3. Inst. 211. *(b)* S. P. C. 195. But an attainder of piracy [128] (B. 1. c. 37. f. 6. 8. Co. Litt. 391.) or petit larceny corrupts not the blood. B. 1. c. 33. f. 36. 3. Inst. 112. Co. Litt. 41. Noy 170.

Sect. 48. SECONDLY, It is also (*c*) agreed, that he can neither inherit as heir to an ancestor, nor have an heir. *(c)* Co. Litt. 8. 391, 392. S. P. C. 195. B. Nonabil. 21. Corone 60.

Sect. 49. THIRDLY, It is also further (*d*) agreed, that wherever it is necessary for any one who would make a title to another to derive the descent through him, the attainder is a bar to such title, (*e*) unless the land were entailed. And therefore if there be grandfather, father and son, and the father be attainted, it is clear, that the son (*f*) cannot claim as heir to the grandfather of the lands in fee-simple, because he must of necessity derive the descent through the father, which by reason of the attainder he cannot do. And for the same reason, if there be two brothers, and one of them having issue a son, be attainted, and either the son or uncle purchase land and die without issue, the other (*g*) cannot be his heir, because the blood of the father, through whom the descent must be conveyed, is corrupted. *(d)* C. Car. 543. *(e)* Litt. Rep. 28. 1. Ven. 413. 417. Noy 159. 166. &c. 1. Levinz 60. 1. Sid. 200, 201. *(f)* 3. Coke 10. Litt. sec. 745, 747. 1. Hale 316. 8. Coke 166. *(g)* 1. Ventris 416. 418.

Dalison 14. 1. Hale 356. Co. Litt. 392. (*g*) C. Car. 543. Dyer 274. 1. Ventris 413. 416. 425. 1. Hale 357.

But it seems a (*b*) general rule, that the attainder of a person who needs not be mentioned in the conveyance of the descent, does no hurt, let the ancestor be never so remote. *(b)* C. Car. 543. 1. Ventris 413. 417. &c. Vide Bracton b. 3. c. 14. f. 17.

note;

mote; and *a fortiori*, therefore it seems clearly to follow, that where one may claim as immediate heir to another, without deriving the descent through any other, he shall not be barred by the attainer of any other. And therefore it seems (a) agreed, that if the son of one attainted purchase land, and have a son and die, such son shall inherit him, because he derives his descent immediately from him. And for the like reason it hath been (b) settled, that if a man hath two sons, and then be attainted, and one of the sons purchase lands and die without issue, the other shall be his heir, because he may make his title without mentioning the father.

(a) 1. Ventris 416.

(b) Co. Litt. 8.

1. Hale 357.

4. Leonard 5.

C. Jac. 539.

1. R. Ab. 625.

C. Car. 543.

1. Ventris 425.

Palmer 19.

1. Levinz 59.

2. Roll. 93.

2. Siderfin 25.

27. This is left doubtful,

Moor 569.

Noy 158. &c. Con. Litt. Rep. 28.

(c) Co. Litt. 8.

1. R. Ab. 625.

But *Sir Edward Coke* (c) says, that the reason of this case is, "because the attainer of the father corrupts only the lineal blood, and not the collateral blood between the brethren, which was vested in them before the attainer;" but he saith, "That some have holden, that if a man after he be attainted have issue two sons, the one cannot be heir to the other, because they could not be heir to their father, for that they never had any inheritable blood in them." But the ground of this opinion seems to be overthrown by the resolution in the case of *Collingwood v. Pace*, wherein it was adjudged (d) in the exchequer-chamber by seven judges against three, that the sons of an alien might be heirs to one another if born in *England*, or naturalized; and yet it is certain that they could not be heirs to their father. Also it seems to (e) be the better opinion, that where a person attainted hath issue by a woman seized of lands of inheritance, such issue may inherit the mother, though he never had any inheritable blood from the father.

(a) 1. Sid. 193.

Hardres 224.

1. Ventris 413.

1. Levinz 59.

(c) 1. Sid. 201.

1. Ventris 422.

426.

Noy 159.

167, 168, 169.

21. Siderfin 248.

This also appears from 13. H. 7. 17. cited S. P. C. 196.

Abridged Bro. Tenant by Curtesy 15.

and wherein it is holden, That if the husband of an inheri-

trix have issue, and be attainted of felony and pardoned, he shall not be tenant by

courtesy by reason of the issue born before the pardon, but by reason of issue born after

he shall; from whence it necessarily follows, that such issue must be inheritable to the

wife. Also it is admitted, Co. Litt. 84. b. That the issue of an inheritrix by an alien

or a person attainted may be in ward, which could not be unless he could inherit the

mother. Vide C. Jac. 539. Litt. Rep. 28. 1. Levinz 59, 60.

But the contrary was

anciently holden. 3. Coke 41. Bracton B. 3. c. 13. f. 19, 20:

Self. 50. FOURTHLY, It seems clear, that notwithstanding a person attainted be to many purposes looked upon as dead in law, yet he hath a capacity to (f) purchase land, which the king shall have upon office found. Also if the father of a person attainted die seized of an estate of inheritance during his life, no (g) younger brother can be heir, but the

(f) Fleta B. 1.

c. 28. f. 9.

Co. Litt. 8 13.

B. M. D'ancestor 36.

S. P. C. 195.

B. Bracton B. 3. c. 6. f. 7.

F. Petition 20.

M. D'ancestor 28.

Dissent 7.

1. Ventris 413. 417. 1. Levinz 66. 29. Affize 11. Noy 166. 170. 1. Siderfin 195. 26. Affize 2.

land

land shall rather escheat; for the elder brother, though attainted, is still a brother, and no other can be heir to the father while he is alive: but it seems (a) agreed at this day, that if he die before the father, the younger brother shall be heir.

(a) See the books next above cited, and Bro.

Discent 64. Con. Bracton B. 3. c. 14. f. 17.

Sec. 51. FIFTHLY, It is clear, that the corruption of blood from an attainer is so high, that it cannot be absolutely valved but by the act of parliament; for it seems (b) agreed, that the king's pardon cannot restore the blood so as to make the person attainted capable either of inheriting others, or of being inherited himself by any one born before the pardon. (c) Yet if such person have a son born after the pardon, and purchase lands and die, such son may be his heir, unless he have an elder brother alive born before the pardon; for a pardon doth as it were make a man a new creature, and give him a new capacity, in respect whereof his issue born after the pardon may be his heir, as to lands purchased after the pardon, in the same manner as if he had never been attainted.

(b) Co. Litt. 2. 391, 392. S. P. C. 153. 3. Inst. 233. Dalison 14. 1. Hale 358. Con. 9. H. 1. 9. (c) See the books next above cited.

† *Sec. 52.* By 7. Ann. c. 21. f. 10. it is enacted, "That after decease of the Pretender no attainder for treason shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders during his, her, or their natural lives only; and that it shall and may be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been, to enter into the same."

† *Sec. 53.* But by 17. Geo. 2. c. 39. f. 3. "The said *vide 4. Comm.* provision so made by the said last recited clause of the 7. Ann. c. 21. shall not take place, nor have any operation, force, or effect whatsoever, until after the deceases, not only of the said Pretender, but also of his eldest, and all and every his son and sons."

† *Sec. 54.* NOTE, The Pretender died at Rome on the first day of January 1766, leaving two legitimate sons, viz. the Chevalier de St. George and the Cardinal of York: the eldest son died at Rome on the third of March 1788, leaving a natural daughter, whom he created *Duchess of Albany*; and at which time his brother, the Cardinal of York, was sixty-three years of age, and unmarried.

9. St. Tr. 679. *notis*; and see the very learned and elegant treatise, intitled "Considerations on the Law of Forfeitures," attributed to the late Lord Hardwicke, or to his son, the noble-minded York.

CHAPTER THE FIFTIETH.

OF

AVOIDING JUDGMENT.

FOR the better understanding the learning concerning ^{4 Comm. 28} the avoiding of judgment in criminal cases, I shall endeavour to shew,

1. How such judgment may be avoided.
2. The effect of such avoidance.

Such judgment may be avoided either,

1. Without writ of error.
2. By writ of error.

They may be avoided without writ of error two ways :

1. For faults apparent in the record.
2. For other matter *dehors* the record.

AND FIRST I shall endeavour to shew where such judgment may be avoided by plea without any writ of error for faults apparent in the record.

Scilicet 1. As to which it is observable, that notwithstanding it be the allowed practice of the court of common pleas to suffer a defendant coming in by (a) *capias utlagatum* the (a) Co. Litt. same (b) Term in which an *exigent* is returnable, to avoid ²⁵⁹ the outlawry without writ of error, by shewing that he 1. Ander. 36. purchased a (c) *superfedeas* out of the (d) same court, ^{Vide inf. f. 9.} *Secus* if he comes in *gratis*. Dyer 192. Con. 39. H. 6. 27. Ab. F. Resp. 52. B. Utlag. 35. ^{Vide} 14. H. 4. 27. F. Ind. Nominis 3. B. Utlag. 28. 30. H. 6. 3. (b) 8. H. 6. 37. Ab. F. Error 19. 19. H. 6. 2. a. Ab. F. Err. 26. But some have holden, that an outlawry cannot be avoided for this or any other cause in another Term. Co. Litt. ²⁵⁹ 37. H. 6. 17. Ab. F. Utlag. 28. B. Error 97. 8. H. 6. 37. Con. ad. 1. And. 38. (c) 19. H. 6. 44. Ab. F. Utlag. 20. B. Utlag. 21. 33. H. 6. 1. Ab. F. Utlag. 27. Bro. 1. 30. H. 6. 3. Ab. F. Protec. 11. B. Utlag. 74. 12. H. 4. 18. Ab. B. Utlag. 14. 7. H. 4. 1. Ab. B. Utlag. 5. 8. H. 6. 7. F. Error 42. 11. H. 4. 34. 33. H. 6. 1. 45. Ab. F. Utlag. 27. 1. Anderson 36. But 1. R. Abr. 743. the contrary is said to have been holden 39. Eliz. (d) 30. H. 6. 3. Ab. F. Protec. 11. *Secus* if the *superfedeas* were from the chancery, 7. H. 4. 5. Ab. F. Superf. 10. B. Utlag. 65. *Superfedeas* 8. ^{Vide} 18. H. 6. 18. Ab. F. Error 24. 7. Edw. 4. 9. Ab. F. Exigent 1. B. Superfedeas 31. F. N. B. 236.

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and

(*e*) 14. H. 4. and (*a*) delivered it to the sheriff before the *quinto exactus* &c. or by shewing any (*b*) other matter apparent on record
 B. Utlag. 15. which makes the outlawry erroneous, as the want of an (*c*)
 L. Quin. original, or the (*d*) omission of process, or want (*e*) of form
 Edw. 4. 5. in a writ of proclamation, &c. or a (*f*) return by a person
 Ab. B. Error 155. appearing not to be sheriff, or a (*g*) variance between the
 Dyer 222, 223. original and the *exigent*, or other process, or the want of such
 and it is said not to be material whether it were delivered to the sheriff or not. Co. Litt. 128. B. Utlag. 8.
 4. B. 4. 42. Con. F. Error 77. Vide F. Err. 42. (*b*) Coke on Litt. 259. 33. H. 6. 1. 5.
 Ab. B. Utlag. 27. (*c*) 11. H. 7. 4. Ab. B. Utlag. 78. 16. E. 4. 9. Ab. B. Error 172.
 F. Utlag. 41. Vide 19. Edw. 4. 8. But it is agreed, that an outlawry without any
 original is not void, but voidable only, F. Color 45. Utlag. 18. 7. H. 7. 5. Ab. F.
 Error 52. Keilway 19. B. Utlag. 45. L. Quin. Edw. 4. 116. (*d*) 33. H. 6. 1. 45.
 Ab. F. Utlag. 27. 8. H. 6. 37. Ab. F. Error 19. B. Utlag. 19. 19. H. 6. 2.
 Ab. F. Error 26. L. Quin. Ed. 4. 116. B. Utlag. 45. (*e*) Dyer 206. 11. H. 4. 34.
 (*f*) Dyer 41. (*g*) F. Utlag. 41. 38. H. 6. 31. Ab. F. Utlag. 31. 21. Edw. 3. 56.
 Ab. F. Dif. 3. 16. Edw. 4. 9. B. Error 172. F. Dif. 17. 20. H. 6. 18. Ab. F.
 Dif. 22. 2. Rich. 3. 13. B. Mif. 80. Variance 90. (*b*) 8. H. 6. 37. Ab. B. Er. 19.
 1. Anderson 36. 1. R. Abr. 743. 2. Inf. 670. Con. B. Utlag. 34. 39. H. 6. 1.

(*i*) 1. R. Ab. Yet it is said in many (*i*) books, to be the constant course
 743. of the court of king's bench, never to reverse an outlawry
 37. H. 6. 17. on the crown-side, either in the same or a different Term,
 Ab. F. Utlag. 28. for (*k*) these or other errors of the like nature, as (*l*) the
 4. E. 4. 42, 43. want of a *capias* to the sheriff of the county whereof the
 Ab. B. Error 158. party is named, or a (*m*) fault in the indictment, without a
 Utlag. 67. writ of error.
 19. H. 6. 2. Ab. F. Error 26. Vide Palmer 43. Con. 11. H. 7. 4. Ab. B. Utlag. 78.
 (*k*) Not for the want of an addition, 19. H. 6. 2. Ab. F. Error 26. 11. H. 6. 15. b. 54.
 (*l*) Sup. c. 27. f. 127. 9. H. 6. 15. B. Utlag. 20. 34. 39. H. 6. 1. (*m*) 1. Bulfr. 109.
 1. Siderfin 144.

(*n*) Co. Litt. Yet since Sir Edward (*n*) Coke seems to be of another
 259. opinion, and since also it is clearly holden, that one may
 Vide 11. H. 7. plead even a matter of fact in the king's bench in avoidance
 4. of an outlawry of *felony*, which cannot be pleaded in avoidance
 B. Utlag. 78. of any other outlawry, as shall be more fully shewn,
 33. H. 6. 1. Ab. F. Utlag. fection the sixth; I shall leave this point to be farther
 27. considered.
 8. H. 6. 37. Ab. B. Utlag. 19.

(*o*) Cro. Eliz. However it is (*o*) agreed, that a conviction of felony
 489, 490. whereon the party hath had his clergy may be discharged
 by exception to the indictment, because no writ of error
 lies on such a conviction, not being a judgment.

As to the second particular, viz. Where a judgment may be avoided, without writ of error, for matters *dehors* the record.

Sett. 2. It is holden, that he who purchases land of a person who afterwards is (a) outlawed of felony, or condemned upon his own (b) confession, may falsify the record, not only as to the time wherein the felony is supposed to have been committed, but also as to the point of the offence. Yet the contrary seems holden, But it is (c) agreed, that where a man is found guilty by verdict, a purchaser cannot falsify as to the point of the offence, but that he may falsify for the time, where the party is found guilty generally of the offence in the appeal or indictment; because the time is not material upon evidence.

(a) Summary 270. 1. Hale 361. 3. Inst. 231. B. Traverse de Officé 35. 7. Edw. 4. 1, 2. F. Estoppel 91. (c) See the books above cited.

Sett. 3. Also it seems (d) agreed, that any judgment whatsoever given by persons who had no good commission to proceed against the person condemned, may be falsified by shewing the special matter without writ of error, because it is void; as where a commission authorises to proceed on an indictment taken before A. B. C. and twelve others, and by colour thereof the commissioners proceed on an indictment taken before eight persons only.

Sett. 4. Also it seems (e) agreed, that if the treason or felony of which a man is attainted, be afterwards pardoned by parliament, the attainder may be falsified by himself or his heir without plea. (f) 3. Inst. 232. 8. Coke 79. Sup. c. 37. 6. 53. C. Eliz. 4. 72. It is said that a writ of error lies on such a pardon; but this contrary to 3. Inst. 231. and 6. Co. 144. For the avoiding of an outlawry by the king's pardon, vide c. 49. f. 15. F. Charter 27. B. Error 56. 18. Edw. 3. 38. B. Appeal 7. 92. 9. H. 5. 14. 15.

Sett. 5. But it hath been (f) adjudged, that the king's letters patents reversing an attainder are void, unless they be afterwards made good by act of parliament.

Sett. 6. It seems generally agreed, that by the common law, in (g) *favorem vñæ*, an outlawry of treason or felony might be avoided by plea, that the defendant was in (h) prison, or in the king's service beyond the (i) sea, &c. at the time of the outlawry (k) pronounced against him.

(g) Co. Litt. 269. 10. H. 4. 7. F. Respon. 101. (h) F. Ut. 11. 11. 18. 27. 33. H. 6. 1. 7. H. 6. 25. B. Ut. 18. 40. 38. Affize 17. 27. Affize 47. F. Corone 123. 8. H. 4. 13. 3. Inst. 32. Con. 21. Edw. 4. 73. B. Ut. 57. 1. H. 7. 13. B. Ut. 68. B. Corone 128. that he who pleads this plea must shew in whose custody he was, and in what county, and must also aver his plea; and by 5. Edw. 3. 13. an averment is given against the testimony of a sheriff or others, having no record testifying such imprisonment. (i) F. Ut. 11. 2. E. 4. 1. F. Respond. 54. 9. H. 4. 3. F. Sci. Fac. 64. 11. H. 7. 5. B. Ut. 79. 4. Edw. 4. 10. Con. F. Cor. 123. Vide 10. H. 4. 7. 8. Ab. F. Ref. 201. 9. Coke 31. Co. Litt. 74. (k) Skinn. 16. F. Ut. 2. 48. F. Forfeitt. 19. F. Ref. 54. 101. 7. H. 6. 25. Ab. B. Ut. 18. 16. Edw. 4. 6. See Davis's Case, 1. Burr. 640.

(a) Co. Litt. 259. But I take it to be generally (a) agreed, that no outlawry for any other crime (against a party (b) rightly described) can be avoided by the plea of any matter (c) of fact whatsoever.

(b) Infra f. 9. (c) Not by the plea of imprisonment, F. Utlag. 27. 47. *33. H. 6. 1. 45. Nor by the plea of being beyond sea, F. Utlag. 27. 33. H. 6. 1. 45.

Outlawry against persons abroad, may be reversed within a year and a day.

Sec. 7. By 26. Hen. 8. c. 13. it is enacted, "That all process of outlawry to be had or made within this realm, against any offenders in treason, being resistant or inhabiting out of the limits of this realm, or in any of the parts beyond the seas at the time of the outlawry pronounced against them, shall be as good and effectual in law to all intents and purposes, as if such offenders had been resistant and dwelling within this realm at the time of such process awarded, and outlawry pronounced."

(d) See Sir T. Armstrong's Case, 3. St. Tr. 335. 3. Mod. 47. Skin. 195. But the law of this case is contradicted See Sirs. 824. and Fost. C.L. 40.

Sec. 8. But by 5. and 6. Edw. 6. c. 4. it is provided, "That if the party so to be outlawed, shall, within one year next after the said outlawry pronounced, (d) yield himself to THE CHIEF JUSTICE of England for the time being, and offer to traverse the indictment or appeal whereon the said outlawry shall be pronounced as is aforesaid, that then he shall be received to the same traverse, and being thereupon found not guilty by the verdict of twelve men, he shall be clearly acquitted and discharged of the said outlawry, &c."

(e) 3. Inst. 32. 216. See Dyer 287. and 2. Jones

Sec. 9. And it hath been (e) resolved, that these statutes extend as well to treasons by subsequent statutes as to those within 25. Edw. 3.

180. Error assigned for the reversal of an outlawry of high treason, that the defendant was beyond sea at the time, See also Davis' Case, 1. Burr. 630. and Rex v. RJ Johnston, Foster 46. where an outlawry for high treason in diminishing the current coin was reversed for the same reason.

Sec. 10. It seems generally agreed, that any outlawry whatsoever may be avoided by a defendant's coming in upon

(f) 33. H. 6. the (f) *capias utlagatum*, and pleading a (g) misnomer either of the name or addition in the writ, &c. as by shew-F. Utlag. 22. ing, that whereas he is called by such a name of (b) baptism, or (i) surname, he hath been always known by a different Nonfuit 6. Estoppel 47. 54. 67. Dyer 192. B. Utlag. 1. 22. 23. 24. 25. 26. Misnomer 52. 1. Edw. 4. 2. 21. H. 6. 50. 5. H. 7. 16. 7. Edw. 4. 1. 27. H. 8. 11. 12. 23. H. 6. 23. 19. H. 6. 80. 5. H. 5. 7. 28. H. 6. 1. Vide F. Variance 74. 19. H. 6. 58. 22. Edw. 4. 37. 38. (g) 33. H. 6. 1. 45. But in the abridgment of this case, Bro. Utlag. 2. the contrary seems to be holden. Fitz. Utlag. 27. (b) Fitz. Utlag. 44. Bro. Utlag. 1. 27. H. 8. 11. 12. (i) 14. Edw. 4. 6. Bro. Utlag. 51. 19. Edw. 4. 24. 25. Bro. Sci. Fac. 132. Misnomer 1. 27. H. 8. 11. 12. 12. H. 6. 7. So if one be called in the writ the son of J. S. he may plead that he is the son of W. S. 19. Edw. 4. 12. Bro. Idemp. Nominis 9.

one, and not by that in the writ, &c. or whereas he is named of such estate, degree, or mystery, that he hath some other (a) addition, and not that in the writ, &c. (a) Fitz. Non. Suit 6.

Estoppel 47. 67. 1. Edw. 4. 2. 22. H. 6. 50. 28. H. 6. 2. b. F. Utlag. 32. 35. 37. Bro. Utlag. 15. 24. 78. Misnomer 52. 5. H. 7. 16. 2. 7. Edw. 4. 1. 5. H. 5. 7. Abridged Bro. Utlag. 15. Fitz. Utlag. 37. But it is there said, that some were of opinion, that the party should be put to his writ of error, because he is the same person. See 38. H. 6. 1. B. Utlag. 32. 51. 10. Edw. 4. 16. Bro. Soire Facies 132. 9. Edw. 4. 24. 25.

Also it is said in many (b) books, that he may plead that (b) Fitz. Ut. there is no such town as that whereof he is named. 23. 26.

22. Edw. 4. 37. 22. H. 6. 23. 33. H. 6. 51. Bro. Utlag. 26. Rast. Ent. 300, 301. But the contrary is holden 33. H. 6. 1. because such plea would avoid the outlawry against all persons. Bro. Utlag. 29. there is an opinion to the contrary, but it seems not warranted by the Year-Book.

And it seems clearly agreed, that he may plead, that at the time of the writ purchased, and ever since, he hath made his abode at some (c) other town, and not at that in the writ, &c.; and it is (d) said, that by such plea, the outlawry shall only be avoided as to the person who pleads it (who shall (e) not be intended to be the person meant), and shall stand in force against the person of the name and addition in the record. (c) Fitz. Ut. 22, 23. 25. 29. 30. 33. Estoppel 54. Error 23. 38. H. 6. 1. 28. H. 6. 2. 33. H. 6. 38.

22. H. 6. 7. 16. 23. 19. H. 6. 80. Dyer 192. 2. E. 4. 1. B. Utlag. 22. 25. 32. 33. 58. 21. Edw. 4. 70. Keilway 101. Such matter is pleaded without any traverse of the place in the indictment. Vide 22. E. 4. 37, 38. 20. H. 6. 19. It is adjudged 28. H. 6. Ab. F. Ut. 25. that it is no plea for one named of the parish of C. that there are three villis in the same parish, viz. D. E. F. and that he was commorant at D. and therefore ought to have been named of it. (d) 39. H. 6. 1. B. Ut. 34. 73. 10. H. 6. 4. 30. H. 6. 2. F. Error 23. 21. H. 7. 13. But it is said, 21. H. 6. 21. Ab. F. Sci. Fac. 55. B. Ut. 23. that a *capias ad satisfaciendum* the judgment is affirmed or disaffirmed by the affirmation or avoidance of the outlawry. Vide 22. H. 6. 16. B. Utlag. 25. 19. H. 6. 58. F. Ut. 21. (e) And for this cause this is a good plea in avoidance of the plea of outlawry in disability. F. Nonability 14. 21. H. 7. 13. 7. E. 4. 10. B. Nona. 50.

But it is said, that a person of the same name and addition as mentioned in a record of outlawry, (f) cannot avoid (f) 21. H. 7. 13. it by averring that there are two persons of such name and addition, and that the person intended is the elder, and he himself is the younger, but shall be put to his writ of *idemnitate nominis*, which is said by some to be the (g) only remedy in such case after an outlawry returned. 14. H. 4. 27. 2. F. Idemp. Non. 3. 5. 7. 8. Vide B. Ut. 29. 55. 56. 21. Edw. 4.

15. 54. 13. H. 6. 7. F. Ut. 1. 24. 43. Variance 74. (g) F. Ut. 6. 16. Resp. 21. Nona. 1. 7.

And it seems, that notwithstanding in civil causes (b) before an outlawry is returned, one of the same name may come into court, and shew, (i) that he is not the person F. Idemp. Non. 3. 5. 7. 8. F. Idemp. Nom. 3. 6. 7. Con. F. N. B. 268. (i) F. N. B. 268. Bro. Idemp. Nom. 3. 4. 11. 14. H. 4. 27. F. Idemp. Nom. 5. 21. Edw. 3. 36. Con. F. Idemp. Nom. 4. B. Idemp. Nom. 6. L. Quin. Edw. 4. 51.

(a) F. Idemp.
Nom. 3.
N. B. 268.
B. Idemp.
Nom. 2. 11.
H. 4. 3.

intended; whereupon if the plaintiff confess it, the diversity of the names shall be entered on the roll, and a new *exigent* shall issue with a fuller description of the person intended, yet this (a) cannot be done upon an indictment, without a writ of *idemitate nominis*; because it would make the process variant from the indictment, which cannot be altered without the consent of the jurors.

And now I am to shew how judgments in criminal cases may be avoided by writs of error.

As to which having shewn already, ch. 29. sect. 40. that the reversal of the attainder of the principal *ipso facto* reverses that of the accessory, I shall in this place only observe the following particulars.

SECT. 11. FIRST, That it seems to be in a great measure (b) Cro. Eliz. (b) settled, that a writ of error to reverse an attainder of 225. 273. 558. treason or felony may be brought as well by the executor as 5. Coke 111. by the heir of the party, but (c) by no other person whatsoever. Owen 147. 148. 1. Leonard 325. Salkeld 295. Shower 13. 4. Comm. 385. (c) Vide Salkeld 60, 61. and Harg. Co. Lit. 13. note (1).

SECT. 12. SECONDLY, That a person attainted of treason or felony, before he can have a writ of error to reverse his (d) 1. Hen. 7. attainder, must (d) assign his errors, and thereupon have 13. b. leave from the Court to prosecute his writ of error. B. Error 351.

SECT. 13. THIRDLY, That no writ of error for the reversal of an attainder of treason or felony is to be (e) allowed (e) 1. Sid. 69. without an express warrant from the king, or the consent 1. B. 46. 71. of the attorney-general. 3. Mod. 42. 1. Roll. 175. See Crawle v. Cook, 1. Vern. 170. the Rioters Case, 1. Vern. 175. Rex v. Wilkes, 4. Burr. and Rex v. Davis, 1. Burr. 641.

SECT. 14. FOURTHLY, That an attainder of felony of a person who had any lands, shall never be reversed by writ of error (f) without a *scire facias* against all the terre-tenants and (f) Dyer 34. lords mediate and immediate; but it is (g) settled, that such 1. Keble 141. *scire facias* is not necessary in the case of high treason. Also 1. Siderfin 316. it is (h) said, that it is not necessary in the case of felony 22. E. 4. 37. when it is suggested on the roll that the party had no lands, 4. E. 4. 10. and the attorney-general confesses it. F. Error 52. 7. H. 7. 5. 4. Edw. 4. 10. (g) Queen v. Stafford, M. 12. Annz, upon examination of all the precedents. (h) 2. Salkeld 495. 3. Keble 29.

SECT. 15. FIFTHLY, That it hath been (i) settled, that (i) 3. Inst. the statute of 33. Hen. 8. c. 29. which enacts, "That if any 214. 215. person shall be attainted of high treason by the course of 1. Hale 353. "the

"the common laws or statutes of this realm, that in every such case, every such attainder by the common law shall be of as good strength, value, force, and effect, as if it had been done by authority of parliament," is to be intended of lawful attainders by due course of the common law, and not of erroneous and void attainders, which therefore may be avoided in the same manner as before.

Sec. 16. SIXTHLY, that it is also clear, that the statute of (a) 28. Eliz. c. 2. which enacts, "That no record of attainder that then was of high treason, where the party is or hath been executed, shall be reversed, avoided, or impeached by any plea, or writ of error," extends not (b) to attainders since that time.

(a) Which is called the 29th in the printed Statutes by a mistake.

3. Levinz 333.

(b) 3. Inst. 31. 213. 1. Hale 53.

Sec. 17. SEVENTHLY, (c) That it hath been holden, (c) 1. Sid. 208. that a writ of error lies in the king's bench on an attainder before the lord high steward.

And now I am in THE SECOND PLACE to shew the effect of the avoidance of a judgment.

As to which I shall take notice only of the following particulars :

Sec. 18. FIRST, That it is (d) agreed, that after an (d) B. Cor. outlawry of treason or felony is reversed, the party shall be 27. 144. 165. put to (e) plead to the indictment, for that still remains 7. H. 7. 5. good. 18. Edw. 4. 9. 3. Mod. 42. C. Jac. 464. F. Er. 52. C. Car. 365. (e) That the law is the same in civil causes, F. Er. 41. 37. H. 6. 17. B. Utlag. 28. 20. H. 6. 3. Ab. F. Protection 17. B. Utlag. 74. Con. 21. H. 6. 50. Ab. F. Nonfuit 6. B. Utlag. 24. 35.

Sec. 19. SECONDLY, It is said by Sir Edward Coke, that if the judgment be erroneous, both that, and the execution thereupon, and all former proceedings shall be (f) reversed (f) 3. Inst. 2. by writ of error; but if the execution be erroneous, that 10. only shall be reversed.

Sec. 20. THIRDLY, That it hath been (g) adjudged, (g) 1. Ander. 188. that if the king grant over the lands of a person outlawed for treason or felony, and afterwards the outlawry be reversed, the party may enter on the patentee, and need neither to sue a petition to the king, nor a *scire facias* against the patentee.

CHAPTER THE FIFTY-FIRST.

O F

EXECUTION AND REPRIEVE.

AND now nothing remains but to shew in what manner a person condemned is to be executed or reprieved.

As to which, having shewn already (a), that a person attainted, standing mute to a demand why execution shall not go against him, shall not be awarded to his penance, but to the ordinary execution proper for the crime, I shall farther observe only the following particulars :

Sec. 1. FIRST, That the court of king's bench hath not only power to award execution against persons attainted there, but also against persons attainted in (b) parliament, or any other (c) court, the record of their attainder, or a transcript thereof, being first (d) removed into the court of king's bench, and themselves brought thither by (e) *habeas corpus*.

C. Car. 176. C. Jac. 495. (d) C. Car. 176. C. Jac. 495. 1. Siderfin 72. 1. Levinz 61. 1. Keble 244. (e) C. Car. 176. C. Jac. 495. 1. Siderfin 72, 73. Foster 44. 140.

In the case of the Earl of Ferrers it was resolved, by all the judges, that if a peer be convicted of murder, before the lords in parliament, and the day appointed by them for execution pursuant to 25. Geo. 2. should lapse before such execution done, a new time may be appointed for the execution either by the high court of parliament before which such peer shall have been attainted, or by the court of king's bench, *the parliament not then sitting*, the record of the attainder being properly removed into that court. Foster 140.

Sec. 2. SECONDLY, That execution ought (f) not to (f) C. Car. be awarded into a different county from that wherein the party was tried and convicted, except only where a record of attainder is removed into the court of king's bench, which (g) may award the execution in the same county wherein it fits.

Hutt. 21. 1. Levinz 61. 1. Siderfin 72.

N. B. Where the prisoner is in the custody of the marshal of the king's bench, the usual place of execution is at Saint Thomas a Waterings, in the county of Surry. 4. Burrows 2086. Strange 553.

Sec.

Sect. 3. THIRDLY, That where a person attainted hath been at large after his attainder, and afterwards is brought into court and demanded why execution should not be awarded against him, (a) if he deny that he is the same person, it shall be (b) immediately tried by a jury returned for that purpose.

(a) Popham

134.

C. Car. 176.

C. Jac. 495.

Crompt. 183.

2. Hale 407. (b) 1. Siderfin 72. 1. Levinz. 61. Whether the party may have peremptory challenges on such a trial, vide c. 43. f. 6. Also Ratcliffe's Case, Foster 40, 41.

Sect. 4. FOURTHLY, That the Court (c) may command execution to be done without any writ.

(c) Finch 478.

3. Mod. 42.

2. Hale 409.

But sometimes execution is commanded by writ, as in Sir Walter Raleigh's Case, Cro. Jac. 496 and in Lord Stafford's Case, St. Tr. vol. 3. p. 101. being both in the custody of the Lieutenant of THE TOWER, and beheaded only.

(d) 3. Inst. 52. *Sect. 5. FIFTHLY,* That it is (d) holden by Coke and Hale, that no execution can be warranted unless it be pursuant to the judgment; and therefore that it cannot be altered by the king, as from hanging to beheading. Yet since there is a great number of precedents, where (e) men condemned to be hanged for felony, and women condemned to be burnt (f) for treason, have been beheaded by force of a special warrant from the king to that purpose; and since (g) *Brañon* and (h) *Staunderford* and (i) *Year-Book* of 35. Hen 6. speaking of this matter, are not so express as Coke and Hale, but say only in general, that the sheriff cannot lawfully behead a man who is only condemned to be hanged, by which they may perhaps intend no more than that he cannot lawfully do it of his own authority, I shall leave this matter to be farther considered (1). However, it is agreed, that where beheading is part of the judgment, as in case of high treason, the were hanged for murder. 3. Inst. 211, 212. 9. Coke 121. (e) Lord Hungerford in 32. H. 8. Duke of Somerset in 5. Edw. 6. 3. Inst. 211. Lord Audley in 6. Car. 1. 1. State Trials 271. (f) Queen Catharine Howard, Lady Jane Grey, Countess of Salisbury, Lady Alice Lisle, 4. State Trials 129. (g) Brañon 104. (h) S. P. C. 13. (i) 35. H. 6. 38.

(1) The king cannot vary the execution so as to aggravate the punishment. But it doth not follow from thence, that he who can wholly pardon the offender cannot mitigate his punishment, with regard to the pain or infamy of it, Foster 269. 1. Burr. 650. and this prerogative is part of the common law, Foster 270, 4. Comm. 398. therefore it is not criminal in the officer who obeys a warrant from the crown for beheading a person under sentence of death for a felony, or a woman for treason of any kind, Foster 268.

king may (a) pardon all the rest, and consequently in such (a) Summary case the judgment will be well executed by beheading only. ^{273.}

52. 212. 12. Coke 130. Supra c. 37. f. 12. 3. Inst. 31. it is said, that such a pardon must be under the great seal; but it seems admitted that it may be by a writ, 2. St. Trials 704, 705.

Sect. 6. SIXTHLY, That it seems (b) agreed at this day, (b) Foster 267. that an execution cannot be lawfully executed by any but the proper officer. ^{Sect. B. 1. c. 23. f. 8, 9. 2. Hale 411.}

In all cases, as well capital as otherwise, execution must be performed by the sheriff or his deputy, whose warrant for so doing was anciently by precept under the hand and seal of the judge, as it is still practised in the court of the lord high steward upon the execution of a peer, 2. Hale 409. though in the court of the peers in parliament it is done by writ from the king Append. 4. B. C. sect. 5. Afterwards it was established, Finch 478. that in case of life the judge may command execution to be done without any writ. And now the usage is for the judge to sign the calendar, a list of all the prisoners names, with the separate judgments in the margin, which is left with the sheriff. 4. Comm. 396. S. P. C. 482. 5. Modern 12. The sheriff, upon receipt of this warrant, is to do execution within a convenient time, which in the country is left at large. In London the Recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do execution at the day and place assigned. Appendix 4. B. C. f. 4. 4. State Trials 332. Foster 43.

Sect. 7. SEVENTHLY, That it is (c) clear, that if a (c) 6. Edw. man condemned to be hanged, come to life after he be 4. 4. hanged, he ought to be hanged again; for the judgment is ^{F. Coro. 335. Finch 389. 457.} not executed till he be dead.

^{2. Hale 412.}
Vide sup. c. 48. sect. 7. 4. Comm. 399.

Sect. 8. EIGHTHLY, It seems agreed, that every Court which has power to award an execution, has also of common right a discretionary power of granting a reprieve; as (d) where a person pleads a pardon defective in point of form, but sufficiently shewing the king's intention of mercy; or where it is (e) doubtful whether the offence be not included in a general statute-pardon; or (f) whether, as it is laid in the indictment, it amounts to so high a crime as that with which the prisoner was charged. ^{(d) 26. Affize 46. Ab. F. Office de Court 34. (e) Dyer 235. (f) Dyer 296. (g) Dyer 205. Sup. c. 6. f. 7.} And it seems (g) agreed at this day, that judges continue to have this power after their commission is determined. ^{This power is said to be rather by common usage than of strict right, 2. Hale 12. 4. Comm. 387. Vide 8. Geo. 3. c. 15. for a power given to judges of assize to reprieve a prisoner for the purpose of obtaining a conditional pardon.—Anze p. 517.}

Sect. 9. NINTHLY, That it is clear, that if a woman (b) 2. Hale quick with child be condemned either for (b) treason or (i) ^{413.} 4. Comm. 388. 3. Inst. 17. (i) *Quare* if before justices of peace, Keilway 51. felony,

(a) S. P. C. 198. felony, she may alledge her being with child in order to get the execution respited, and thereupon the sheriff (a) or marshal shall be commanded to take her into a private room, and to impanel a jury of (b) matrons to try and examine whether she be quick with child or not; and if (b) 3. Inst. they find her *quick with child*, the execution shall be respited (c) till her delivery.

17. Finch 478. S. P. C. 198. (c) 4. State Trials 612. S. P. C. 198. 3. Inst. 17. 4. State Trials 612. F. Corone 253. 410. 23. Affize 2. Ab. Corone 97. Fitz. Corone 188. 25. Edw. 3. 42. Ab. idged Fitz. Corone 130. 12. Affize 11. Abridged Fitz. Corone 168. Bro. Corone 72. Bro. Pain 11.

(d) Finch 478. Sect. 10. But it is agreed, that a woman (d) cannot demand such respite of execution by reason of her being quick with child more than once; and that she can neither save herself by this means from (e) pleading upon her arraignment, nor from having (f) judgment pronounced against her upon her conviction. Also it is said both by (g) *Staundforde* and *Coke*, that a woman can have no advantage from being found with child, unless she be also found *quick with child*.

S. P. C. 198. F. Corone 168. 253. 3. Inst. 17. 23. Affize 2. Ab. B. Corone 97. F. Corone 188. 25. Edw. 3.

42. Abridged Fitz. Corone 130. 12. Affize 11. Bro. Corone 72. Pain 11. (e) Finch 478. 3. Inst. 17. 22. Affize 71. Abridged F. Corone 180. B. Corone 88. (f) 1. State Trials 611. S. P. C. 198. 3. Inst. 17. 2. Hale 413. (g) 3. Inst. 17. S. P. C. 198. and in 22. Affize 71. Abridged Fitz. Cor. 180. Bro. Corone 88. it is expressly said, that the inquiry was whether the women were enfeint with a live child or not. See also Summary 272. and Finch 478. Yet F. Corone 127. 168. 388. 250. 410. 22. Affize 2. 25. Edw. 3. 42. 12. Affize 11. B. Corone 72. B. Pain 11. it is said only, that the woman was found enfeint or pregnant.

† Sect. 11. By 25. Geo. 2. c. 37. "For the purpose of adding a further terror and peculiar mark of infamy to the punishment of death now inflicted by the law upon the horrid crime of MURDER; a crime so contrary to the known humanity and natural genius of the British nation:" it is enacted, "That all persons (3) who shall be found guilty of wilful murder, be executed according to law on the day next but one after sentence passed, (b) unless the same shall happen to be the *Lord's day* commonly called *Sunday*, and in that case on the Monday following.—I hat the body of such murderer so convicted shall, if such conviction and execution shall be in the county of *Middlesex* or within the city of *London* (i) or

(3) A peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the same according to the provisions of this act. The Earl of Ferrers Case, Foster 139. 10. State Trials p. 478. (b) Baccaria c. 19. 4. Comm. 397. (i) Upon all executions in London, the Recorder, after reporting to the King in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do execution on the day and at the place assigned. 4. Comm. 397.

"the

“ the liberties thereof, be immediately conveyed by the
 “ sheriff or sheriffs, his or their deputy or deputies, and
 “ his or their officers, to the hall of THE SURGEONS COM-
 “ PANY, or such other place as the said Company shall ap-
 “ point for this purpose, and be delivered to such person
 “ as the said Company shall depute or appoint, who shall
 “ give to the sheriff or sheriffs, his or their deputy or depu-
 “ ties, a receipt for the same ; and the body so delivered
 “ to the said Company of Surgeons shall be dissected and
 “ anatomized (4) by the said surgeons or such person as
 “ they shall appoint for that purpose. And in case such
 “ conviction and execution shall happen to be in any
 “ other county or other place in *Great Britain*, then the
 “ judge or justice of assize, or other proper judge, shall
 “ award the sentence to be put in execution the next day
 “ but one after such conviction (except as is before ex-
 “ cepted), and the body of such murderer shall in like man-
 “ ner be delivered by the sheriff, or his deputy and his of-
 “ ficers, to such surgeon as such judge or justice shall di-
 “ rect for the purpose aforesaid.”

(4) At a meeting of the judges in 1712, to consider of this act, it was agreed by much the greater part, that the judgment for dissecting and anatomizing, and touching the time of execution, ought to be pronounced in cases of petty treason, though murder is only mentioned, except in the case of women, and in that case too the time of execution may be a part of the judgment. *Foster 107.*

† *Stat. 12.* By 25. Geo. 2. c. 37. s. 3 and 4. it is also enacted, “ That the sentence shall be pronounced in open
 “ court immediately after the conviction of such murderer,
 “ and before the Court shall proceed to any other busi-
 “ ness, unless the Court shall see reasonable cause for post-
 “ poning the same ; in which sentence shall be expressed,
 “ not only the usual judgment of death, but also the (a) It was
 “ time (a) appointed hereby for the execution thereof, and held by the
 “ the marks of infamy hereby directed for such offenders, in twelve judges
 “ order to impress a just horror in the mind of the offen- in Mich.
 “ der, and in the minds of such as shall be present, of Term,
 “ the heinous crime of murder. But it is provided, that 10 Geo. 2.
 “ after such sentence is pronounced as aforesaid, in case That, except
 “ there shall appear reasonable cause, it shall and may be in the cases
 “ lawful to and for such judge or justice, before whom within this
 “ such criminal shall have been so tried, to stay the execu- act, the time
 “ tion of the sentence, at the discretion of such judge or and place of
 “ justice, regard being always had to the true intent and execution are
 “ purpose of this act.” by law no
 “ part of the
 “ judgment.
 “ 4. Com. 397.
 “ See also

3. *Burr. 1812.* in what manner sentence shall be pronounced against a murderer.

† *Stat.*

4. Comm. 202.

xxi. Deut. 7. 23.

Ff. 48.

19. 28. f. 15.

4. St. Tr. 203.

(a) Upon a

conference of

the judges

there was

some doubt

whether

hanging in

chains might

ever be made

part of the judgment.

But on debate it was agreed by nine judges, that in all cases

within the act, the judgment for dissection and anatomizing *only*, should be part ofthe sentence. And if it should be thought advisable, the judge might *afterwards* direct

the hanging in chains by special order to the sheriff, pursuant to the power given

for that purpose in the *proviso*. Foster 107. and 10. St. Tr. 39. *notis*. See also Hall's

Case, Cases Cro. Law 21.

† *Sec.* 13. And by 25. Geo. 2. c. 37. f. 5. "It shall

be in the power of any such judge or justice to appoint

the body of any such criminal to be hung in chains (a).

But that in no case whatsoever the body of any murderer shall be suffered to be buried, unless after such

body shall have been dissected and anatomised as aforesaid; and every such judge or justice shall, and is here-

by required to direct the same either to be disposed of

as aforesaid to be anatomised, or to be hung in chains in

the same manner as is now practised for the most atrocious offences."

How a condemned murderer shall be confined.

† *Sec.* 14. By 25. Geo. 2. c. 37. f. 6. it is enacted, "That

from and after such conviction, and judgment given

thereupon, the gaoler or keeper to whom such criminal

shall be delivered for safe custody, shall confine such prisoner to some cell, or other proper and safe place within

the prison, separate and apart from the other prisoners;

and that no person or persons whatsoever, except the

gaoler or keeper, or his servants, shall have access to any

such prisoner, without licence being first obtained for

that purpose under the hand of such judge or justice,

before whom such offender shall have been tried, or under

the hand of the sheriff, his deputy or under-sheriff."

Judges may relax the restraints of the act.

† *Sec.* 15. But by 25. Geo. 2. c. 37. f. 7. it is provided,

"That in case any such judge or justice shall see cause to

respite the execution of such offender so condemned as

aforesaid, such judge or justice may relax or release all

or any of the restraints or regulations herein before or

herein after directed to be observed by the gaoler or

keeper of the prison where such prisoner shall be confined, by any licence in writing signed by such judge or

justice for that purpose, for and during the time of such

stay of execution."

Convicts for murder to be fed on bread and water only.

† *Sec.* 16. And by 25. Geo. 2. c. 37. f. 8. it is further

enacted, "That after sentence passed as aforesaid, and until

the execution thereof, such offender shall be fed with bread

and water only, and with no other food or liquor whatsoever (except in case of receiving the Sacrament of the

Lord's Supper, and except in case of any violent sickness

or wound, in which case some known physician, surgeon,

or apothecary, may be admitted by the gaoler or keeper

of

“ of the said prison to administer necessaries ; the christian
 “ and surname of such physician, surgeon, or apothecary,
 “ and his place of abode being first entered in the books
 “ of the said prison or gaol, there to remain).”

† *Sect. 17.* By 25. Geo. 2. c. 37. it is also enacted, Penalty for
not executing
the directions
of the act.
 “ That in case such gaoler or prison-keeper shall offend
 “ against or neglect to put in execution any of the direc-
 “ tions or regulations hereby enacted to be observed, such
 “ gaoler or prison-keeper shall for such offence forfeit
 “ his office, and be fined in the sum of twenty pounds, and
 “ suffer imprisonment until the same be paid.”

† *Sect. 18.* Also, by the said statute, “ to rescue the
 body of any such malefactor from the custody of the
 sheriff, *after execution*, is made felony and transportation for
 seven years.”—And “ to release any person from prison
 committed for, or found guilty of murder, or to rescue such
 an offender going to or during execution, is felony without
 benefit of clergy (a).” Penalty for
Rescuing the
body of a
malefactor.
(a) Vide
3. Hawk. P.C.
270. where
this part of the
act is recited
at large.

END OF THE FOURTH VOLUME,

A
T A B L E
OF
P R I N C I P A L M A T T E R S
CONTAINED IN THE
F O U R T H V O L U M E.

Such of the Contents as have the Letter (N) added at the End refer to the Notes.

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32. But abettors *absent* at the infusion are accessaries only, ib.
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17. But as to high treason, the right of peremptory challenge is revived by 1. P. and M. c. 10. 390
18. *Quere*, whether a peremptory challenge shall be allowed upon the trial of a collateral issue, 390. f. 6
19. At common law the prisoner might challenge any number of jurors *peremptorily* under the number of thirty-five, 390. f. 7
20. By 22. Hen. 8. c. 14. no person arraigned for any petit treason, murder, or felony, shall be admitted to challenge peremptorily above twenty, 390. l. 8
21. But the 1. and 2. Phil. and Mary, c. 10 has revived the old challenge of thirty-five as to *petit treason*, 16.
22. Contrary to the opinions of *Hale* and *Hawkins*, if a prisoner challenge more than twenty, the challenge shall be over-ruled, and the jurors sworn, 391
23. Where a juror is challenged for cause by the prisoner, the cause shall be immediately shewn, and not as in a

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- challenge by the king (No. 9) after the panel is perused, *Page* 397. f. 10
24. If the *cause* of challenge be disallowed, the same juror may be challenged *peremptorily* before he is sworn, *ib.*
25. It is a good *cause* of challenge that a juror is an alien, a minor, or a villain, *ib.*
26. A peer may be discharged from the jury by writ of privilege, or he may challenge himself as being a peer, or he may be challenged, for that cause, by the party, 392. f. 11
27. In what cases the want of freehold is a good cause of challenge against jurors (*See JURORS*), 392. f. 12. to 398. f. 25
28. It is a good cause of challenge that a juror is outlawed, or sentenced to any *infamous* punishment, or that he hath been convicted of treason, felony, perjury, conspiracy, forgery on &c. &c. 398
29. Such exceptions are not saved by "a pardon, *quare*, *ib.*
30. Anciently excommunication was a good cause of challenge, *ib.*
31. But such causes, unless the record be shewn, are not principal, but to the favour only, *ib.*
32. The conviction of conspiracy must be at the king's suit, *ib.* (N)
33. It is no good cause of challenge to a juror that he is returned upon the *quære*, contrary to the statute West. 2 c. 38. 399. f. 26
34. By 25. Edw. 3. c. 2. a challenge that a juror is indicted for the same offence which he is impanelled to try, is good, 399 f. 27
35. If the juror have any claim to the forfeiture which may follow conviction, it is a good cause of challenge, 399. f. 28
36. Or that he hath declared an opinion against the prisoner *matchlessly*, *ib.*
37. A juror cannot be examined as to such fact upon a *voir dire*, because it sounds in reproach, *Page* 399 (N)
38. It is no good challenge that the juror has found others guilty on the same indictment, 400. f. 29
39. If a juror hath given *his dogs the names of the king's witnesses*, it is a good cause of challenge for the king, 400. f. 30
40. The king may either make a principal challenge or to the favour, *where he is a party*, 400. f. 31
41. A subject cannot take a challenge for the favour against the king, 400. f. 32
42. The subject cannot challenge for the malice of the sheriffs, unless some instance of partiality be shewn, *ib.*
43. It is no principal challenge, where the king is a party, that the juror is his immediate tenant, 400. f. 33
44. A challenge for such cause ought to conclude to the favour, *ib.*
45. By 28. Edw. 3. c. 13 ALIENS AND DENIZENS shall be tried by jurors the one half denizens and the other aliens, if so many aliens can be found in the place, &c. 400. f. 34
46. The English half of the jury ought to be qualified as jurors (*See JURORS*), 401
47. *Quære*, if any omission which the law requires in a jury *per medietatem linguæ*, be a good cause of challenge, 402, 403

CLERGY.

1. Anciently the clergy insisted that the *sacredness* of their character exempted them from the punishments of *secular tribunals*, 247. f. 1. 283. f. 110
2. And, by the *canon law*, all persons in holy orders were intitled to the *privilegium clericale*, 248
3. Before the statute *article clerici*, 9. Edw. 2. the *privilege* of clergy was denied to those who had abjured the realm,

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- realin, or confessed their guilt, &c. *Page 248. f. 3*
4. By 23. Edw. 3. c. 4. all manner of clerks, as well secular as religious, shall enjoy the benefit of holy church, 248. f. 4
 5. All persons were construed to be within this statute who could read a *verse*, except convicted heretics, Jews, Mahomedans, Pagans, persons blind or maimed, or those guilty of *bigamy*, 248
 6. But by 1. Edw. 6. c. 12. persons guilty of bigamy are admitted to clergy, *ib.*
 7. By 21. Jac. 1. c. 6. women guilty of such larceny for which men were admitted to clergy, shall be burnt in the hand and imprisoned, 248. f. 6
 8. By 3. and 4. Will. and Mary, c. 9. where a man may demand his clergy; a woman, upon her prayer for the *benefit of this statute*, shall have it also, and be burnt in the hand and imprisoned, 250. f. 8
 9. Sacrilege, and breaking the prison of the ordinary, were only intitled to clergy at the discretion of the ordinary, 250
 10. By 4. Hen. 7. c. 13. every person not within orders, who has once received the benefit of clergy, shall not be admitted to it a second time, 251. f. 11
 11. Every person within holy orders claiming clergy a second time, shall lose the benefit, if he fail to produce his letters, or a certificate on a day given by the Court, *ib.*
 12. By 28. Hen. 8. c. 3. persons in holy orders shall be under the same pains as persons not in holy orders, as to the offences mentioned in this statute, 251. f. 12
 13. By 32. Hen. 8. c. 2. persons in holy orders admitted to clergy, shall be burnt in the hand, and suffer in all respects as lay persons so admitted, *ib.*
 14. By 1. Edw. 6. c. 12. all persons convicted of other offences than those mentioned in the act, shall have the benefit of clergy, as before the first of Hen. 8. *Page 251. f. 13*
 15. Where lay persons are not excluded from clergy the first time, persons in holy orders may have it as often as they want it, except, &c. 251
 16. But where the offence is generally excluded from clergy, persons in holy orders shall have no more benefit than lay persons, 252
 17. By 34. and 35. Hen. 8. c. 14. the clerks of the peace shall certify the attainders of clerks convict unto the king's bench, and, on being written to, shall certify the same to the judges of gaol-delivery, 252. f. 14
 18. The justices may write in their own name to the clerk of the crown in the king's bench, for the *certificate of the transcript* of an attainer, 253. f. 18
 19. By 3. and 4. Will. and Mary, c. 9. the clerks of the peace, &c. shall certify convictions, at the request of the prosecutor, which shall be evidence on a second indictment for an offence within clergy, 253. f. 19
 20. In what manner a *COUNTERPLEA* may be filed, in order to oust an offender of his clergy, 254. f. 19 (N)
 21. Clergy is demandable by the common law, upon an indictment or appeal, for any crime whatsoever which subjects the offender to the loss of life or member, except high treason and sacrilege, 254. f. 20
 22. New-created treasons *against the king* are also excluded, without special words, 254. (N)
 23. Petit treasons seem to have been excluded by the common law. But by 25. Edw. 3. *de clero*, c. 4. it is allowed for any treasons or felonies touching other persons than the king himself, 255. f. 21
 24. The construction also, that *infideliores viarum* and *depopulatores agrorum* were ousted of clergy, is revived by 4. Hen. 4. c. 2. 255. f. 22

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25. From the above statutes 'it follows, that all persons who were intitled to the benefit must, if not intitled to it, be denied it by some statute made since the 25. Edw. 3. Page 255. f. 23
26. Wherever an offence is made felony by statute it shall have clergy, unless expressly excluded, 255. f. 24
27. To oust an offender from the benefit of clergy, the indictment must expressly bring his case within the statute by which the privilege is taken away, 255. f. 25
28. A murder must be laid and proved of *malice prepense*; the offence of an accessory before must be *maliciously*; of a cutpurse *clim et secretè à p. sua*; robbery must be *in or near the highway*, or the offender shall have his clergy, *ib.*
29. But with respect to accessories, words which are tantamount in sense, and differ only in the manner of expression, are sufficient, *ib.*
30. Where a statute takes away clergy from an offence which was capital at common law, the indictment need not conclude *contra formam statuti*, *ib.*
31. A statute excluding the principals from clergy doth not thereby exclude accessories before or after, 256. f. 26
32. Neither doth a statute excluding the accessories thereby exclude principals, *ib.*
33. Where a statute excludes those from clergy who shall be *found guilty* of any crime, it shall be construed to exclude principals only, *ib.*
34. Where clergy is allowable, it shall be allowed as well to one who stands mute, &c. as to one who is convicted, 256. f. 27
35. But a statute taking clergy from those who shall be *found guilty*, doth not take it from those who shall stand mute, &c., 257. f. 28
36. But such a statute extends as well to those who shall confess, as to those who are convicted by verdict, *ib.*
37. OF STATUTES TAKING AWAY CLERGY, Page 257 f. 29
38. By 23 Hen. 8. c. 1. no person found guilty of petit treason, murder of *malice prepense*, robbing churches, &c. or persons in their dwelling-house, any of *the family being therein and put in fear*, robbing *in or near the highway*, burning houses, or barns of corn, nor any *accessaries* to such offenders, shall be admitted to clergy, persons in holy orders excepted, 257
39. This statute does not extend to persons standing mute, challenging, &c. or outlawed, and was therefore easily evaded, 257. f. 31
40. By 25. Hen. 8. c. 3. this defect is remedied, 258. f. 32
41. But this statute extends not to appeals nor to accessories before, nor to persons outlawed, 258. f. 33
42. By 1. Edw. 6. c. 12. the above offences (No. 38) and all *burgess-stalkers* are again ousted of clergy; but all other cases of felony shall be entitled to clergy in the same manner as before the 1. Hen. 8. 258
43. The statute extends to appeals, persons in holy orders (No. 38), and persons outlawed, 259. f. 35
44. The defects of this statute pointed out, 259
45. By 5. and 6. Edw. 6. c. 10. the 25. Hen. 8 is revived, 260
46. The question examined, whether this statute gives the whole of the 25 Hen. 8 &c. &c. *ib.*
47. By 4. and 5. Phil. and Mary, c. 4. *accessaries before* to petit treason, wilful murder, robbery in a dwelling-house, or near the highway, and arson, are deprived of clergy, 261. 263
48. This statute is restrained to such robberies in a dwelling-house only as were deprived of clergy by the former acts, 263. f. 46
49. An indictment or appeal to *oust* an accessory of clergy, must pursue the substance of this statute exactly, 264. f. 47

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50. By 3. and 4. Will. and Mary, c. 9. such persons as were before excluded by former acts, on conviction by verdict or confession, are excluded on standing mute, challenging, &c. or being outlawed. Page 264. f. 48
51. This statute does not extend to appeals, nor to felonies by subsequent statutes. 264. f. 49.
52. By 23. and 25. Hen. 8. principals in PETIT TREASON are excluded from clergy upon indictment, &c. &c. 265. f. 50
53. *Quare* if they are not excluded in appeals, 265. f. 51, 52
54. By 23. and 25. Hen. 8. and 1. Edw. 6. c. 12. wilful MURDER of *malice prepense* is excluded in all cases, 265. f. 54
55. It is not excluded in appeals upon challenging more than twenty, 266
56. By 4. and 5. Phil. and Mary, c. 4. accessaries before are excluded as well upon indictments as appeals in *all cases*, 266. f. 56
57. By 1. Jac. 1. c. 8. HOMICIDE BY STABBING is excluded; but those who *abet* this offence are not, 266. f. 57
58. By 3. and 4. Will. and Mary, c. 9. those indicted of *such manslaughter* are excluded, as well on standing mute, &c. as on conviction, 266. f. 58
59. By 8. Eliz. c. 4. LARCENY from the person of another *privily without his knowledge* is excluded from clergy, 267. f. 59
60. This statute does not extend to accessaries either before or after, 267. f. 60
61. By 1. Edw. 6. c. 12. and 2. and 3. Edw. 6. c. 33. principals in HORSE-STEALING, &c. are excluded from clergy, 267. f. 61
62. By 31. Eliz. c. 12. all accessaries both before and after are also excluded, 268. f. 63
63. By 10. and 11. Will. 3. c. 23. to commit larceny in any shop, warehouse, coach-house, or stable, *privately*, and to the walds of five shillings, or to aid therein, is excluded from clergy. Page 268. f. 63
64. Neither accessaries nor persons outlawed are excluded from clergy for this offence.
65. By 12. Ann. c. 7. to steal from any dwelling-house or out-house to the amount of forty shillings is excluded from clergy. ib. f. 65
66. Apprentices under fifteen years of age who shall rob their masters are not within the act, 269. f. 67
67. Persons outlawed and accessaries are not within this act, 269. f. 68
68. By 22. Car. 2. c. 5. to steal cloth or WOOLLENS FROM THE RACK or tenter in the *night-time* is excluded from clergy, 269. f. 69
69. By 18. Geo. 2. c. 27. to steal linen, &c. from BLEACHING OR PRINTING GROUNDS, or to aid therein, is felony without clergy, ib.
70. But the court may in discretion transport the offender for fourteen years, 269
71. By 22. Car. 2. c. 5. embezzling NAVAL STORES to the amount of twenty shillings is excluded from clergy, 270. f. 70
72. But the court may transport for seven years, 270
73. By 14. Geo. 2. c. 6. and 15. Geo. 2. c. 34. to steal SHEEP, OR THE OTHER CATTLE therein mentioned, is excluded from clergy, ib.
74. By 24. Geo. 2. c. 45. to steal goods on NAVIGABLE RIVERS to the value of forty shillings is excluded from clergy, ib.
75. By 26. Geo. 2. c. 19. stealing from VESSELS IN DISTRESS, &c. is excluded from clergy, 271
76. By 23. Hen. 8. c. 1. 25. Hen. 8. c. 3. and 3. and 4. Will. and Mary, c. 9. SACRILEGE, or robbing any church, chapel, or holy place, is excluded from clergy. 271. f. 72

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77. It is not sacrilege, within this act, unless the robbery be accompanied with a breaking. *Page 271. f. 73*
78. But by 1. Edw. 6. c. 12. all persons are ousted of clergy for felony, *quodly taking goods out of any church, &c.* 271. f. 74
79. The offence may be tried in a different county than that in which the offence shall be committed. *ib.*
80. Accessaries to such a robbery or taking are not excluded by any statute, unless the offence amount to burglary. 272. f. 75
81. *Quare*, if sacrilege is not excluded from clergy by the common law, 272. f. 76
82. All persons, not in holy orders, indicted of "robbing in or near the highways," are excluded by 23. and 25. Hen. 8. 1. Edw. 6. c. 12. and 3. and 4. Will. and Mary, c. 9. 272
83. No robbery is within these statutes, but such as is laid "in or near the highway, and to have put the person robbed in fear," 273. f. 79
84. By 25. Hen. 8. c. 3. and 3. and 4. Will. and Mary, c. 9. robberies and burglaries tried in a different county from that in which they were committed, are excluded from clergy, if they be of such a kind as would have been excluded upon a conviction in the proper county, 273
85. There is no need of an entry on record that the felony was committed in a different county, 274. f. 82
86. But it is usual to write on the margin of the indictment, that it is for felony in another county, *ib.*
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88. By 3. and 4. Phil. and Mary, c. 4. accessaries before the fact in robbery in or near any highway, are excluded clergy, 274. f. 84
89. By 23. and 25. Hen. 8. and 3. and 4. Will. and Mary, c. 9. to rob any person in his dwelling-house, any of the family being within and put in fear, is excluded from clergy, *Page 275. f. 85*
90. By 3. and 4. Phil. and Mary, c. 4. accessaries before are also excluded, 275. f. 86
91. By 1. Edw. 6. c. 12. to break a house in the day-time, and commit felony therein, any person being within at the time, is excluded from clergy, whether tried in the same or a different county, 275. f. 87
92. By 4. and 5. Phil. and Mary, c. 4. accessaries before are also excluded, *ib.*
93. The breaking of a cupboard, door, or trunks, &c. or any fixture only, is not a breaking within the act, 276. f. 88
94. By 3. and 4. Will. and Mary, c. 9. to take away goods in any dwelling-house, any person being therein and put in fear, or to aid in so doing, is excluded from clergy, 276
95. By 5. and 6. Edw. 6. c. 9. persons found guilty of robbing any other in their dwelling-house, or any part thereof, any of the family being within the precincts of the same, shall be excluded from clergy, whether the family there being shall be sleeping or waking, 276. f. 89
96. No person found guilty of robbing any person in any booth or tent in any fair or market, the owner or any of his family being within, shall be admitted to clergy, whether the family there being be sleeping or waking, 277. f. 90, 91
97. No robbery is within this statute which is not accompanied with an actual breaking, 277. f. 92
98. A sojourner being in the house at the time of the robbery, will not bring it within the statute, 277
99. It is only necessary to state, that *drapers persons* were in the house, with-
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- out shewing they were under any relation to the party robbed, *Page* 278
100. By 3. and 4. Will. and Mary, c. 9. to rob any house in the day-time, *any person* being therein, or to aid in so doing, is excluded from clergy, *ib.*
101. *Quare*, if accessaries to a robbery in a booth or tent are excluded, except it be from the person of a man, *ib.*
102. By 39. Eliz. c. 15. any person *found guilty* for felonious taking away, in the day-time, money or goods to the value of 5s. in any dwelling-house, or the outhouse thereto belonging, *although no person be therein at the time*, shall be excluded from clergy, 279 f. 95
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104. A chamber in an inn of court is a dwelling-house within this act, 279. f. 97
105. A lodging in *Somerſet-house* (an old palace), or *Whitchall*, is not within this act, *ib.*
106. No accessary is ousted of clergy by this statute, 279. f. 98
107. He who stands by and abets another while he breaks and enters the house, and afterwards divides the spoil, but does not actually enter the house himself, is not within the statute, 280
108. The law of this case doubted and explained, *ib.*
109. By 3. and 4. Will. and Mary, c. 9. whoever shall *assist* another to break any dwelling-house, shop, or warehouse thereunto belonging, in the day-time, and steal money or goods to the value of 5s. *although no person be therein*, shall be excluded from their clergy, 280. f. 99
110. This statute not mentioning outhouses, an *assistant* to such a felony in an outhouse, not being a shop, &c. is clearly intitled to his clergy, 281. f. 100
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112. But all principals in any felony within 39. Eliz. are excluded from clergy, whether in the same or a different county, 282. f. 102.
113. By 3. and 4. Will. and Mary, c. 9. whoever shall *rob* any other person, or shall *assist*, &c. to commit such offence, shall not have the benefit of his clergy, 282. f. 103
114. In BURGLARY the principal is ousted of clergy, by 1. Edw. 6. c. 12. if any person be in the house at the time of the breaking, and thereby put in fear, 282. f. 104
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117. By 23. and 25. Hen. 8. and 3. and 4. Will. and Mary, c. 9. principals in ARSON are excluded from clergy, 282. f. 107
118. By 4. and 5. Phil. and Mary, c. 4. accessaries to the fact before, in all cases, are also excluded, 282. f. 108
119. By 1. Edw. 6. c. 12. every *peer* is allowed clergy in all cases wherein others are excluded by that act, except wilful murder, 282. f. 109
120. Therefore peers are entitled to clergy, unless ousted by some statute made since 1. Edw. 6. or revived by 5. and 6. Edw. 6. c. 10. *ib.*
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126. Except the conviction was for sacrilege, or breaking the prison of the ordinary, *ib.*
127. The temporal judge is to decide whether the offence be within the privilege, and whether the prisoner is entitled to the benefit, 285. f. 113
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129. While the title to clergy depended upon reading the *neck verse*, the temporal judge over-ruled the ordinary, and recorded *legit* or *non legit*, according to his own judgment, 285
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145. *Quare* if a pardon would have this effect, *ib.*
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150. The 8. Eliz. c. 4. &c (*Vide supra*, No. 148, 149.) seems to take from the spiritual court the power of *acquiring* the party for the crime for which he may have received clergy,
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152. After a man is admitted to his clergy, it is actionable to call him a felon,
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153. By 5. Ann. c. 6. where persons shall be burnt in the hand, &c. the judge may also in his discretion commit the offender for not less than six months, nor more than two years, to the house of correction, &c. 293. f. 134

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157. Judgment of transportation is only put in the place of *judgment* for burning in the hand, and not in the place of the actual burning,
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8. An *implied confession* is, where a defendant in a case not capital doth not directly own his guilt, but in a manner admits it by yielding to the king's mercy, *ib.*

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32. They also become forfeited upon a *jugam fecit* found by the coroner, *Super visum corporis*, Page 481. f. 14
33. The goods upon such a finding are forfeited absolutely, and all the issues of the offender's lands, till he be acquitted or pardoned, *ib.*
34. Where a prisoner, either as principal or accessory before or after, is acquitted before justices of oyer, &c. of a capital felony, but is found to have fled, he shall forfeit his goods, but not the issues of his lands, *ib.*
35. *Quare*, if the law is not the same upon acquittal, and *jugam fecit* in petty larceny, *ib.*
36. The party may in all cases, except in the coroner's inquest, traverse the *jugam fecit*, *ib.*
37. In all cases the particulars of the goods found to be forfeited may be traversed, *ib.*
38. If a default be made before the exigent is awarded, the party forfeits his goods, both in a capital case and in petty larceny, 481
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40. But they are saved by a reversal of the award of the exigent, *ib.*
41. *Quare*, if the party do not forfeit his goods upon a presentment of twelve men, that he fled or resisted being apprehended, 482. f. 16
42. Goods are also forfeited, by being seized by a felon in his flight, whether they are his own goods, or those of others which he has stolen, 482. f. 17
43. OF FORFEITURE BY STATUTE, 482. f. 18
44. By 26. Hen. 8. c. 13. all estates of inheritance in use or possession are forfeited by an attainder of high treason, 483. f. 19
45. By 35. Hen. 8. c. 20. attainders for high treason by the common law, shall

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- shall be as effectual as attainder by parliament, and forfeitures vested in the king without office, *Page 483. f. 19*
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56. Where one attainted of high treason is seized of a defeasible estate in tail, and hath at the same time a right to an ancient entail which is discontinued, he forfeits both the entail in possession, and the right to the old entail, 484. f. 25
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58. In what cases the form of the proviso by which such a power is reserved, will keep the forfeiture out of the statute, *ib.*
59. An annuity granted to a man *pro consilio impediendo*, is not forfeitable by these statutes, 485
60. *Quere*, if an office granted to a man for life, and requiring skill and confidence, be forfeitable, *ib.*
61. If an office be granted *in fee*, it may be forfeited by the *common law*, *ib.*
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64. A saving of *corruption of blood* in a statute concerning felony doth, by necessary consequence, save the land to the heir, 486. f. 29
65. A saving of land to the heir prevents corruption of blood and loss of dower, *ib.*
66. A saving of the corruption of blood in a statute concerning treason, doth not save the land to the heir, *ib.*
67. The forfeiture upon an attainder of either treason or felony shall have relation to the time of the offence, for avoiding all subsequent alienation of the lands, 486. f. 30
68. But as to chattels, the forfeiture shall only relate to the time of the conviction or *fugam fecit* found, *ib.*
69. *Quere*, whether in *præmunire* the forfeiture shall relate to the time of the offence, or only to that of the judgment, 487. f. 31
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72. The goods of such a person cannot be removed till they are forfeited, 487. f. 34

73. Whether the goods of a person indicted may be inventoried, and detained in custody before the conviction, and till they are forfeited, 487. f. 35. *notis*

74. *Quare*, Where a person is found guilty of murder by the coroner's inquest, whether the coroner shall inquire, and value his goods, and deliver them to the township, 488. f. 36

75. The party's goods may be appraised by the sheriff upon a *non est inventus* returned to the second *capias*, 489. f. 37

76. But by 1. Rich. 3. c. 3. no sheriff, &c. shall seize the goods of any person imprisoned on suspicion of felony, until such person be convicted, or his goods forfeited, 488. f. 38

77. This statute extends as well to the seizure of money as to any other chattel, 488. f. 39

78. The goods may be seized as soon as forfeited by force of this statute, &c. 488. f. 40

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80. At common law it was no plea for the township that the goods were delivered to a particular person, and that he had embezzled them, 489. f. 41

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3. And *quare*, whether it is not a good objection to the competency of a witness, 436. f. 167

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2. By 34. and 35. Hen. 8. c. 14. f. 16. justices of gaol-delivery are authorized to write to the clerk of the peace for the certificate of the conviction of a defendant, for the purpose of preventing his receiving the benefit of clergy a second time, 252

3. The justices of gaol-delivery may have a panel returned without any precept or writ, and by a bare award of the reason of it, 375

4. Justices of gaol-delivery may order a jury to be returned immediately for the trial of a prisoner arraigned before them, 375. f. 4

5. By 8. Geo. 3. c. 15. subsequent judges of gaol-delivery may order transportation, &c. 299

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- which relate to the return of grand juries, may also plead the general issue, Page 16. f. 26
2. The defendant to a *qui tam* action or information cannot plead a special plea together with the general issue, 223. f. 63
3. A pardon *sub pede sigilli* cannot be pleaded with, or alter the general issue, unless it bear a date subsequent to such issue, 360. f. 67
4. A defendant *qui tam* may take advantage on the general issue, that the offence arose in a different county, 112. f. 32. p. 128. f. 70
5. A defendant *qui tam* cannot give a discharge by a subsequent statute, as he may a *proviso* in the statute upon which he is sued, in evidence on the general issue; but he must plead it specially, 127. f. 69
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7. In capital cases the *general issue* may be pleaded with any other plea, either in bar, or in abatement, which is not repugnant to it, even after such plea is found against the defendant, 363
8. The plea of the general issue amounts to a waive of a pardon, *ib.*
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10. Where a defendant shall be stopped to plead the general issue by a confession, or a former issue found against him, 364. f. 4
11. *San assault de mesue* may be given in evidence on the general issue in an indictment, but not in an action, 456. f. 203
12. They may present such offences within the county as they conceive require redress, without any bill being before them for that purpose, Page 1
3. Upon a bill of indictment being preferred before them, they must either find *billā vera*, or *ignoramus* for the whole, 2
4. If they find a bill either specially or conditionally it is void, *ib.*
6. This relates only to cases where they find part of *the same indictment* to be true, and part false, and do not either affirm or deny the fact submitted to their inquiry, 2 (N) 1
6. Where a bill contains two counts for distinct offences, they may indorse *billā vera* as to the one, and *ignoramus* as to the other, *ib.*
7. OF THE RETURN AND QUALIFICATION OF GRAND JURORS, 11
8. The grand jury must be at least twelve in number, all of the same county, and returned by the sheriff or other proper officer, without any nomination, 11. f. 16
9. Grand jurors ought to be freemen and liege subjects, and not under an attainder for treason or felony, nor *villains*, aliens, or outlaws, whether for a criminal, or perhaps personal matter, *ib.*
10. Any person under prosecution may, before he is indicted, challenge a grand juror as being outlawed for felony, &c. a villain, or returned at the instance of the prosecutor, or not returned by the proper officer, *ib.*
11. But grand jurors, like all other men, shall be intended legal and honest, until the contrary appear, 12
12. One outlawed on an indictment of felony may plead, in avoidance of it, that one of the grand jury was outlawed for felony, 12. f. 18
13. It is unsettled at the common law, whether grand jurors ought to be freeholders, 12. f. 19

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14. *Hibb* says, they ought to be freeholders, but to what value is uncertain, *Page 12. note in marg.*
15. Upon the equity of the *stat. West. 2. c. 28.* old men above 70 years of age, persons perpetually sick, or living out of the county, shall not be returned upon grand juries, *13*
16. But such persons being returned upon the grand jury, may lawfully serve on it if they think fit, *ib.*
17. The Court may in discretion excuse such persons, but they cannot have any action for being so returned, *14*
18. Grand jurors in the Sheriff's torn shall have 20s. a-year freehold, or 26s. a-year copyhold, *ib.*
19. By 3. Hen. 7. c. 1. every grand juror for the enquiry of concealments, &c. before justices of the peace, shall have 40s. yearly, *ib.*
20. By 33. Hen. 6. c. 2. grand jurors in the county palatine of *Lancaster* shall have 5l. a-year, *ib.*
21. By 28. Edw. 1. c. 9. sheriffs shall put those in inquests as be next neighbours most sufficient and least suspicious, *14. f. 22*
22. By 34. Edw. 3. c. 4. all panels shall be made of the next people which shall not be suspect nor procured, *ib.*
23. Both these statutes extend to grand jurors, *ib.*
24. By 11. Hen. 4. c. 9. all grand jurors shall be of the king's lawful liege people, and returned by the sheriffs or their bailiffs, without any denomination, *15. f. 23*
25. Upon this statute, a person who is not returned, but procures his name to be read among those of the grand jury, may be indicted and fined, *16. f. 24*
26. It is questioned, whether a coroner's inquest is within the purview of this statute; but all other inquests are within it, *16. f. 25*
27. A person arraigned or outlawed upon an indictment taken by a grand jury, contrary to 11. Hen. 4. may plead it in avoidance of it, *16d*
quere, if he has taken trial on it without exception, *Page 16. f. 26. 27*
28. If one grand juror returned contrary to 11. Hen. 4. join in finding an indictment, it vitiates the whole, *17. f. 28*
29. A prisoner shall have counsel assigned to take an exception to an indictment found by grand jurors returned contrary to 11. Hen. 4. *17. f. 29*
30. In objecting to an indictment for such a defect, the record must be in court, *17. f. 30*
31. By 3. Hen. 8. c. 12. justices of gaol delivery and justices of the peace, may reform the panel of grand jurors returned by the sheriff, by taking out and putting to the names which be so impanelled, *17*
32. Therefore if a grand juror who is nominated to the sheriff, except by the justices in pursuance of the above act, it shall vitiate the indictment he joins to find, according to the 11. Hen. 4. *18. f. 33*
33. No grand jurors can indict any offence whatsoever which doth not arise within the limits of the precincts for which they are returned, *18. f. 34*
34. Whether a grand jury ought to find a bill of indictment to be true upon probable evidence only, *82. notes*
35. A person committed as principal, and taken surreptitiously from his confinement to give evidence before the grand jury on a bill preferred against his accomplice, is a competent evidence for that purpose, *82. notes*
36. And *quere*, if a grand jury should find a bill to be true upon evidence palpably improper, and the petty jury should afterwards find the prisoner guilty of the indictment, on legal evidence, whether the validity of such a conviction shall be impeached on that account, *82. notes*

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- 2 Such goods will not pass by a grant of all felons goods, without being specially named, 236. f. 21

cause them to be convicted, he shall be entitled to a pardon, Page 333, 334

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2. This act shall not extend to apprentices under the age of fifteen years, 269. f. 67
3. Persons outlawed, and accessories, are not within this statute, 269. f. 68

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By 1. and 2. Phil. and Mary, no *habeas corpus* shall be granted to remove any prisoner out of gaol except signed by the hand of chief justice, &c. 149. f. 35

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1. By 1. Edw. 6. c. 12 no person convicted of felonious stealing of horses, geldings, or mares, shall be admitted to clergy, 258 f. 34
2. By 2. and 3. Edw. 6 c. 33 (the above statute being plurally expressed), stealing one horse, gelding, or mare, shall be put from clergy in the same manner as stealing of two, &c. 260
3. These statutes extend, as well to those who are outlawed, or challenge more than twenty, as to those who are found guilty by verdict, 267
4. By 31. Eliz. c. 12. accessories both before and after the fact in horse-stealing are put from clergy, 268. f. 63
5. By 10. and 11. Will. 3 c. 23. if any horse-stealer, being out of prison, shall discover two or more who had then been guilty of horse-stealing, and

HOUSEBREAKING.

See ROBBERY.

1. By 1. Edw. 6. c. 12 no person convicted of breaking any house, any person being therein and put in fear, shall be admitted to clergy, 258. f. 34
2. This statute extends both to indictments and appeals, 259 f. 35
3. It doth not exclude those who challenge more than twenty, 259. f. 36
4. *Sed quere*, if those who challenge more than twenty are not included in the word "*consilium*", *vide in marg.*
5. This statute omits accessories, 259. f. 37
6. The breaking of the house must be such as the law construes to be felonious, 260. f. 40
7. By 3. and 4. Will. and Mary, c. 9, housebreakers who challenge more than twenty are ousted of clergy upon an indictment, whether in the same or a different county, 275 f. 87
8. By 4. and 5. Ph. and Mary, c. 4. accessories before to such breaking, if accompanied with stealing in a dwelling-house, are ousted of their clergy in all cases, *ib.*
9. No breaking is within the 1. Edw. 6. which doth not amount to an actual breaking of an house, or of some part of

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of it, as of a cupboard, &c. fixed to the freehold, and therefore the breaking a trunk, &c. is not within the statute, &c. *Page 276. f. 88*

19. By 39. Eliz. c. 15. whoever shall be found guilty of feloniously taking away in the day-time any goods to the value of five shillings in any dwelling-house or out-house, &c. shall not be admitted to clergy, though no person be within the same at the time, 279. f. 95

11. This statute shall only extend to such a taking as is accompanied with a felonious breaking, 279. f. 96

12. A chamber in an inn or court is a house within the intent of this statute; but a lodging in *Whitehall* or *Somerjet-House* is not, 279. f. 97

13. No accessory is ousted of his clergy by this statute, 279 f. 98

14. Nor is an aider or abettor ousted, unless it appear that he was actually within the house, 280

15. By 3. and 4. Will. and Mary, c. 9. whoever shall aid or abet another to break any dwelling-house, shop, warehouse, &c. and shall feloniously take to the value of five shillings, shall be excluded from clergy, 280. f. 99

16. An assistant, or an accessory before, to such a felony in an out-house, not being a shop or warehouse, &c. without entering it, is still intitled to clergy, 280. f. 100, 101

17. But all principals in any felony within 39. Eliz. c. 15. are excluded, whether in the same or a different county, 281. f. 102

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1. By 5. Ann. c. 6. persons convicted of larceny, who are liable to be burnt in the hand, may be committed to the house of correction for not less than six months, nor more than two years, &c. 293, 294

2. By 19. Geo. 3. c. 74. a further punishment inflicted, 294, 295

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1. What lands shall be forfeited by attainer of the husband, which he holds in right of his wife, *Page 478, &c.*
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note in margin

I N D I C T M E N T.

1. An indictment is an accusation at the suit of the king, found to be true by the oaths of twelve men of the county, returned to inquire of all offences therein committed,

2. The

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1. The difference between an indictment and a presentment and inquisition, Page 1
2. A grand jury must either find *billa vera*, or *ignoramus* for the whole, or the finding is void, 2. f. 2
3. So also, if they indorse a bill conditionally, or true as to a different crime than that which the indictment charges, it is void, ib.
4. But where the bill consists of two distinct counts, as riot and assault, they may indorse *billa vera* as to the one, and *ignoramus* as to the other, (N) 1
5. An indictment is so far the king's suit, that the party who prosecutes it is a good witness to prove it, 3. f. 3
6. No damages can be given upon an indictment even if the king were, by his commission to any new court, so to direct, ib.
7. But if a statute expressly direct that a party shall recover damages by indictment, they may be so recovered; otherwise they ought to be sued for in an action on the statute, 3
8. The king's bench, by virtue of a privy seal, may give to a prosecutor the third part of a fine assessed on a criminal prosecution, ib.
9. And to induce defendants to pay prosecutors their costs, it is the practice to intimate an inclination to mitigate the fine to the king, ib.
10. All crimes of a public nature, all disturbances of the peace, all oppressions, and all misdemeanors of a public evil example against the common law, may be indicted, 3. f. 4
11. No injuries of a private nature, unless they some way concern the king, can become the subject of indictment, ib.
12. Wherever a statute prohibits a matter of public grievance, or commands a matter of public convenience, an offender is punishable both by action and indictment, unless such a mode of proceeding is expressly excluded, f. 4
13. *Quere*, if the offender had, in an action, been fined to the king, whether he can afterwards be indicted for the same offence, Page 4. f. 4
14. No offence against a statute of a private nature will bear an indictment, ib.
15. Instances of injuries which are not indictable, (N) 1
16. Where a new offence, not prohibited by the common law, is created by statute, and a particular manner of proceeding appointed, but no mention made of indictment, no indictment can be maintained on such statute, 5. and (N) 2
17. But if such a statute give a recovery by action, bill, plaint, information, or otherwise, then it authorises a proceeding by way of indictment, 5
18. Where a statute adds a further penalty to an offence prohibited by the common law, the offender may still be indicted as at common law, 5
19. If such an indictment conclude *contra formam statuti*, and cannot be made good upon the statute, it may be maintained as an indictment at common law, ib.
20. Where new created offences are prohibited by a general prohibitory clause, an indictment will lie; but not if the clause be particular, and specific remedies are appointed, (N) 2
21. Where a new offence is created, an indictment will lie on a substantive prohibitory clause, although there be afterwards a particular provision and remedy given, ib.
22. An indictment will not lie where a statute creating a new offence is not prohibitory, but only inflicts the forfeiture, and specifies the remedy, ib.
23. Where the offence was punishable before the statute, the particular remedy given in it is cumulative, but where the offence was not punishable at common law, the particular remedy given must be pursued, 5. (N) 2

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25. WHERE INDICTMENT IS UNNECESSARY, *Page 302*
26. Antiently a person taken upon immediate pursuit, with the property stolen upon him, might be brought into court, and tried without indictment, *5. f. 5*
27. But by 25. Eliz. c. 4. &c. proceedings upon the *mainour* are wholly taken away, *6. note in marg.*
28. In trespass for goods in the king's bench, if the jury find they were stolen, the defendant may be tried, on such finding, for the felony without indictment, *6*
29. But such a finding, except in a court of criminal jurisdiction, has no effect, *ib.*
30. Even in the king's bench, on an indictment, if the jury find that some other than the defendant did the fact, yet that other cannot be tried on such finding without being first indicted, *ib.*
31. But it is otherwise on the finding of a coroner's inquest, *ib.*
32. A verdict upon a declaration for a misdemeanor in a proper court, will serve for an indictment against the persons found guilty by it, *ib.*
33. Where a person may be tried without indictment upon an appeal not prosecuted, *7. f. 7. to 10. f. 14*
34. Whether one may be tried at the suit of the king for a capital offence upon the sheriff's return without any indictment, *10. f. 14*
35. A man may be arraigned upon an indictment while an appeal is depending, *10. f. 15*
36. Who may be indictors, and in what manner they are to be returned (*See GRAND JURY*), *11. f. 16. to 18. f. 34*
37. Within what place the offences enquired of by the grand jury must arise (*See GRAND JURY*), *18. f. 34 to 25*
38. If it doth not appear by an indictment that the offence arose within the county, or riding, or other special division or precinct for which the jury which found it was returned, it is erroneous, *Page 18*
39. *A fortiori*, if it appear that the offence were in a different county than that for which the grand jury are returned, *ib.*
40. *Quere*, if the finding of collateral matter, expressly alleged in the indictment to have happened in a different county, is not void, *ib.*
41. In what manner the county and place in which the offence arose must be expressed in the indictment, *ib.*
42. If upon not guilty pleaded it shall appear that the offence was committed in a different county from that in which the indictment was found, the defendant shall be acquitted, *19. f. 55*
43. By the common law, if a man had died in one county of a stroke received in another, he could not be indicted in either, *19. f. 36*
44. But by 2. and 3. Edw. 6. c. 24. where any person shall be stricken or poisoned in one county, and die of the same in another, an indictment may be found in the county where the death shall happen, *19*
45. So if a fact done in one county prove a nuisance in another, it may be indicted in either, *20. f. 37*
46. If one guilty of larceny in one county carry the goods stolen into another, he may be indicted in either, *20. f. 38*
47. If a man marry two wives, the first in a foreign county, and the second in England, he may be indicted in England, *20. f. 39*
48. If a woman be taken by force in one county, and carried into another, and there married, the offender may be indicted and tried in the second county, *20. f. 40*
49. But if a record be stolen or avoided, &c. partly in one county, and partly in another, he cannot be indicted for the felony in either, *20. f. 40*

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50. By 26. Hen. 8. c. 6. offences committed in *Wales* may be enquired of in the next *English county* where the king's writ runneth, Page 20
51. By 28. Hen. 8. c. 15. treasons and felonies committed upon the sea shall be enquired of in such places as shall be limited by the king's commission, in like manner as if done upon land, 21. f. 43
52. But this statute extends not to offences done in creeks, &c. within the body of a county, 21. f. 47.
53. By 11. & 12. Will. 3. c. 7. accessaries before and after to piracy shall be enquired of according to 28. Hen. 8. c. 15. 21.
54. By 8. Geo. 1. c. 24. persons deemed accessaries by 11. & 12. Will. 3. c. 7. shall be proceeded against as principals, 22
55. All piracies and felonies upon the sea may be enquired of upon the land, or tried at sea, &c. 22. f. 47
56. Ancient opinions, how high treason done out of the realm was to be indicted, 22. f. 48
57. By 35. Hen. 8. c. 2. all treasons committed out of the realm shall be enquired of by the king's bench, or in any county by the king's commission, 22. f. 49
58. If the king's bench, or the king's commissioners, remove into a different county from that in which the indictment is found, the jury shall come from the first county, 23
59. How the commissioners and county for such trials are well assigned, 23. f. 51
60. Whether treasons committed in Ireland by a *peer* may be tried in England, 23. f. 52
61. By 2. & 3. Edw. 6. c. 24. accessary in one county to a felony in another, may be tried in the county where the offender is accessary, 24
62. THE FORM OF THE BODY OF AN INDICTMENT, 25
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64. No periphrasis will supply those words of art which the law hath appropriated for a description of the offence, 25. f. 55
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66. An indictment for breaking prison without shewing the cause of imprisonment is bad, *ib.*
67. An indictment for refusing to be sworn constable after *legitimo modo electi*, must shew the manner of the election, *ib.*
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69. An indictment for a nuisance for doing that which in its consequences only, and not in itself, is so, must shew the circumstances which cause the nuisance, *ib.*
70. But where the thing done is in itself a nuisance, as keeping a bawdy-house, &c. the particular circumstances are not necessary, *ib.*
71. An indictment for coining *alchemy* like the king's money, must shew what money: the reason of it, *ib.*
72. An indictment for perjury not shewing in what manner and in what court the false oath was taken, is insufficient, *ib.*
73. It is necessary, both in indictments and appeals of mayhem and murder, to set forth particularly in what manner the hurt was given, *ib.*
74. An indictment for extortion *colore officii*, without shewing for what it was extorted, held good, *ib.*
75. An indictment for procuring, &c. must shew the false tokens, 28. (N) 10
76. An indictment for words against a justice, must shew the words, *ib.*

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79. An indictment for a forcible entry ought to contain a positive charge of *disseisin*, *28. (N) 10*
80. An indictment charging a man disjunctively is void, as *murdravit vel murdari causavit, &c.* *28. f. 58.*
81. Every indictment must charge some particular offence, or else several offences particularly, and certainly expressed, and not with being an offender in general: the reason of this rule, *29. f. 59*
82. Instances in which, upon this ground, indictments have been held too general and insufficient, *29. (N) 11*
83. Anciently, indictment for *conspiracy* in general was held good, and the general charge of *insultatores viarum et depopulatores agrorum* ousted of clergy; but this is remedied by 4. Hen. 4. c. 2. *30*
84. But a man may be generally indicted as a common barrator; but the defendant must have a note of the facts intended to be proved delivered to him previous to the trial, *ib.*
85. There is no need to name any particular place where the defendant was a barrator, *ib.*
86. An indictment for barratry need not conclude *ad nocumentum omnium legiorum; diversorum* is sufficient, *ib.*
87. *Quare*, Whether an indictment of a common scold may so conclude, or whether it must be *ad commune nocumentum*? *31. (N) 1. in marg.*
88. An indictment against one as a common scold is good without setting out the particulars, for the same reasons that such indictment of barratry is good: the reason given, *31*
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90. Every charge in an indictment must be laid positively, and not by way of recital, as with a *quod cum, &c.* and the want of a direct allegation of any thing material cannot be supplied by intendment, *Page 31. f. 60*
91. An indictment felonically murdered cannot amount to murder without *ex malitia premeditata*, *ib.*
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95. But if, in the first part of an indictment of death, the assault be laid with *malice prepense, &c.* there is no need to repeat it in the subsequent clause which shews the giving of the wound. *32*
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121. Every other *misnomer* of the defendant, except that of the surname, and also every defective addition, are as fatal in an indictment as an appeal, *Page 36. f. 69*
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37. The said clause extends not to any suit by a party grieved, or by the attorney-general, 111. f. 29

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39. By 21. Jac. 1. c. 4. suits for offences against any penal statute by a common informer, shall be commenced by action, bill, plaint, information, or indictment, before justices of *assize*, *nisi prius*, *oyer and terminer*, and *gaol-delivery*, or before justices of the peace,

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77. No costs shall be recovered in an action on a statute creating a new offence, which gives no certain penalty to the party grieved, but only his damages in general, &c. *ib.*
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90. Two informations exhibited on the same day may mutually abate each other; for there is no priority, *ib.*
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94. By 4. Hen. 7. c. 20. if any defendant shall be found pleading any recovery, &c. or bar to a popular action,

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117. By 18. Eliz. c. 5. no jury shall be compelled to appear at *Westminster* to try any issue by a common informer on a penal statute committed thirty miles from *Westminster*, except the attorney-general require it to be tried at bar, which request shall be on the back of the *distringas*, Page 129
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138. By 21. Jac. 1. c. 7. all grants and dispensations from the penalties of statutes, &c. &c. are void, *ib.*
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2. By 21. Jac. 1. c. 6. women, on conviction of simple larceny under 10s. and for which men would be intitled to clergy, shall be burnt in the hand, and imprisoned, 249. f. 7.

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4. The

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4. The judgment against a woman in all cases of treason was to be drawn to the place of execution, and there burnt: but now, by 30. Geo. 3. c. 48. they shall be hanged; *Page* 470. f. 6
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END OF THE FOURTH VOLUME.

ERRATA ET ADDENDA,

Page 2, line 25. for "*fuern,*" read "*fuern.*"

Page 20, in margin, dele "*Bk. 1. c. 42. f. 19. Bk. 1. c. 45. f. 6.*"

Page 21, in margin, after "*Cases in Crown Law,*" read "*2d Edit. page 101.*"

Page 89, last line, instead of "*Rex v. Sharrer, 1. Term Rep. 198.*" read "*Rex v. Sparrow and Urquhart, 2. Term Rep. 198.*"

Page 430, in margin, after "*Rhode's Case, Cases Crown Law,*" read "*page 23.*"

Page 430, in margin, after "*Aickle's Case, Cases Crown Law,*" read "*page 303.*"

